(16,629.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 136.

ADOLPH COHN, APPELLANT,

vs.

ANGELINA DAILY AND A. J. MEHAN.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 2, 1899.

a UNITED STATES OF AMERICA, } ss:
Territory of Arizona, }

I, J. L. B. Alexander, clerk of the supreme court of the Territory of Arizona, do hereby certify that the following pages, numbered from 1 to 243, inclusive, contains a true and complete transcript of the record and proceedings had in said court in the cause of Adolph Cohn, appellant, against A. J. Mehan, Dewit C. Turner, Bell H. Chandler, C. F. Fisher, and Angela Dias de Daley, appellees, as the same remains of record and on file in said office; and I further certify that no opinion has been rendered or filed in said cause in said office, and that the citation issued in said cause and lodged in said office has been lost, as shown in the affidavit of myself, appended hereto, and that the order for the enlargement of the time within which said citation was made returnable, annexed hereto, is the original thereof.

Seal Supreme Court of Arizona.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of Phœnix, the capital of Arizona Territory, this 28th day of June, A. D. 1897.

J. L. B. ALEXANDER, *Clerk.*

b In the Supreme Court, Territory of Arizona.

ADOLPH COHN, Pl't'ff and Appel't,
vs.
A. J. MEHAN ET AL., Def'ts and Appellee-. } No. 390.

Barnes & Martin, att'ys for pl't'f & appel't.

Transcript on Appeal.

Filed Oct. 2, 1893.

T. D. HAMMOND, *Clerk.*

1 TERRITORY OF ARIZONA, }
County of Cochise. }

At a term of the district court of the first judicial district of the Territory of Arizona in and for the county of Cochise, begun and holden at Tombstone, within said county of Cochise, before the Honorable Richard E. Sloan, and ending on the — day of ——, 189–, the following case came on for trial, to wit:

ADOLPH COHN, Plaintiff,
vs.
A. J. MEHAN, DEWITT C. TURNER, BELL H. CHANDLER, F. C. Fisher, and Angela Dias de Daley, Defendants.

And the following papers were filed with the clerk of said court on the dates hereinafter set forth, and certain proceedings were had and entered of record as hereinafter appears, viz:

2 In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Cochise.

ADOLPH COHN, Plaintiff,
vs.
A. J. MEHAN, DEWITT C. TURNER, BELL H. CHANDLER, F. C. Fisher, and Angela Dias de Daley, Defendants. } Complaint.

The plaintiff complains and alleges:

1st.

That the plaintiff is a resident of the county of Cochise, Territory of Arizona; that the defendants A. J. Mehan, Dewitt C. Turner, and Bell H. Chandler are residents of Pueblo, State of Colorado; F. C. Fisher, a resident of Denver, State of Colorado; and Angela Dias de Daley is a resident of Cochise county, Territory of Arizona.

2nd.

That he is now and for a long time hitherto has been the owner and entitled to the possession of those certain lots, pieces, or parcels of land known as mining claims in Warren mining district, in the county of Cochise, Territory of Arizona, named and located
3 and of record in the recorder's office of said county of Cochise, reference being hereby thereto made for particular description as follows, to wit:

The "George Washington" mining claim, 600 feet by 1,500 feet, situate ¾ of a mile east of the town of Bisbee, recorded in Book 11, page 255, record of locations of mines; also the "Old Republican" mining claim, 600 feet by 1,500 feet, situate about one mile east of the town of Bisbee, in Mule pass, and running parallel with the "George Washington" mining claim, recorded in Book 9, page 84, record of location of mines; also the "Copper Frying Pan" mining claim, 200 feet by 1,500 feet, joins the "Sacramento" mining claim on the north side line and joins the south line of the "Cleaveland" mining claim, and on the east by the "Stars and Stripe-" mining claim and parallel of the north side of the "Vet-ran" mining claim, and running parallel of the south side line of the "Angel" mining claim and about ¾ of a mile east of Bisbee, in Mule pass, recorded in Book 11, page 628, of records of locations of mines; also the "Irish Mag" mining claim, 600 feet by 1,500 feet, situate about one-half mile from Copper Queen smelter, in a southeasterly direction, and running parallel with the "Keystone" mining claim, recorded in Book 11, page 104, record of location of mines; also the "Old Canteen" mining claim, 600 feet by 1,500 feet, situate about 1½ miles east of the town of Bisbee, recorded in Book 9, page 89, record of location of mines, and bounded on the north by the
4 "Cumberland" mining claim, on the west by the "Little New York" mining claim, and on the south by the "Virginia" mining claim, 600 feet by 410 feet, being a relocation of the

"Gold Bear" mining claim, the owners having failed to perform the assessment work for the year 1887, said claim running parallel with the "Keystone" mining claim, and joins the "Silver Spray" mining claim, and is about ¼ of a mile from the "Holbrook" mining claim, recorded in Book 11, page 555, record of locations of mines; also the "Intervenor" mining claim, 600 feet by 1,500 feet, situate about 1½ miles east of the town of Bisbee, in Mule gulch, and joins the "Erie Cattle Company" mining claim, on the *its* west end, recorded in Book 11, page 613, record of locations of mines; also the "Angel" mining claim, 300 feet by 800 feet, situate about ½ mile east of the town of Bisbee, recorded in Book 11, page 225, record of location of mines; also the "Diadem" mining claim, 600 feet by 1,500 feet, situate about 1½ miles east of the town of Bisbee, in Mule gulch, and joins the "Erie Cattle Company" mining claim on its south side.

3rd.

That the said plaintiff is the owner of the interest in and to said premises, to wit, the entire interest in the five following mining claims, viz., the "George Washington" mining claim; also the "Old Republican" mining claim; also the "Copper Frying Pan" mining claim; also the "Angel" mining claim; an undivided one-half interest in the "Irish Mag" mining claim; an undivided
5 one-third interest in the four following mining claims, viz., the "Copper Monarch" mining claim; also the "Intervenor" mining claim; also the "Old Canteen" mining claim, and in the "Diadem" mining claim, and that the said defendants claim an estate or interest therein adverse to the said plaintiff.

4th.

That the claims of the said defendants are without any right whatever, and that the said defendants, or either of them, have no estate, right, title, or interest whatever in said premises or several mining claims or any part thereof.

Sec. 5th.

Plaintiff further says that on and before September 13th, 1890, the defendant A. J. Mehan was the owner of the interests in the above-mentioned mining claims now owned by plaintiff; that at said date said Mehan — indebted to plaintiff in the sum of $299.00; that at said time plaintiff brought suit in the justice court of precinct No. 1, in said county of Cochise, against said Mehan by filing written evidence of the indebtedness and causing summons to issue thereon, which summons was personally served on said Mehan in said county, and said defendant, Mehan, appeared in said cause in said court and made defence to said action by a general denial; said justice court had jurisdiction of the person and the subject of the action; that on filing said suit this plaintiff caused a writ of
6 attachment to issue out of said court by first filing the affidavit and undertaking required by law, and caused such

writ to be duly levied as required by law, and duly filed the same in the recorder's office of said county; that afterwards, to wit, on Sept. 29th of the same year, the same being the day set for the trial of said cause, plaintiff obtained a judgment in said cause against defendant Mehan for the said sum and the costs of the action; the said Mehan failing to pay said judgment or any part thereof, the plaintiff caused an execution to issue thereon from said court in due manner required by law, which said writ was duly levied and a sale thereunder in the manner and time in such cases provided by law, at which said sale this plaintiff became the purchaser of the property herein sued for. Said sale occurred on October 27th, 1890, and this plaintiff obtained from the officer selling a certificate of sale. Said Mehan failed to redeem said property or any part thereof from the said sale until the time of redemption had expired, after which said time the plaintiff received from the officer who sold said property under said judgment (the same being a duly qualified and acting constable in said county and precinct) a deed duly executed as by law required, which said deed is of record in the recorder's office of Cochise county, Arizona, Book of Deeds R. E. No. —, p.—, conveying to plaintiff all the interest of said Mehan in said properties.

7 Wherefore the plaintiff prays:

1st.

That the defendants may be required to set forth the nature of their several claims, and that all adverse claims of the defendants may be determined by a decree of this court.

2nd.

That by said decree it be declared and adjudged that the defendants or either of them have no estate or interest whatever in or to said premises or mining claims, and that plaintiff is the owner and entitled to the possession and his title good and valid.

3rd.

That the defendants be forever enjoined and be barred from asserting any claim whatever in or to said premises or mining claims adverse to the plaintiff, and for such other relief as to this honorable court shall seem meet and agreeable to equity, and for his costs of suit.

M. A. SMITH AND
W. C. STAEHLE,
Plaintiff's Attorney.

(Endorsed:) No. 1614. Title of court and cause. Complaint. Filed Sept. 4th, 1891. A. H. Emanuel, clerk.

8 Title of Court and Cause.

Answer of Angela Dias.

Now comes Angela Dias, sued in the above-entitled action under the name — Angela Dias de Daley, and for herself alone answers plaintiff's complaint herein as follows:

1st.

Demurs to said complaint on the ground that the same does not state facts sufficient to constitute a cause of action in favor of plaintiff and against the defendant.

2nd.

And defendant, answering said complaint, denies that plaintiff is the owner of the mining claims described in said complaint or the owner of any of said mining claims or of any part or interest in said mining claims or any of them.

Wherefore this defendant prays judgment against plaintiff; that plaintiff take nothing by his suit, and that defendant recover her costs in this action.

JAMES REILLY,
Attorney for Angela Dias.

Endorsed: No. 1614. Title of court and cause. Answer of Angela Dias. Filed Sept. 17th, 1891. A. H. Emanuel, clerk, by W. D. Monmonier, deputy.

9 Title of Court and Cause.

Amended Answer.

Now comes Angela Dias, sued in this action by the name of Angela Dias de Daley, and after service thereof files this her amended answer to plaintiff's complaint as follows:

1st.

Defendant demurs to said complaint that said complaint does not state facts sufficient to constitute a cause of action.

2nd.

That said complaint is ambiguous and uncertain in this: In paragraphs two and three thereof it avers that plaintiff is the owner of the property described therein, and thereafter in paragraph five of said complaint an attempt is made to derain title, which attempted derainment shows no title in plaintiff.

2nd.

And defendant, answering said complaint, denies each and every allegation therein contained, except the first paragraph thereof,

setting out the residences of the several parties to this action, and in particular denies that plaintiff is or ever was the owner of the mining claims described in said complaint or of any of them
10 or of any interest in them or any of them, and denies that on the 13th day of Sept., 1890, or at any time the defendant A. J. Mehan was the owner of said mining claims or interests in mining claims or owned any interests in said mining claims or interests in mining claims or any of them.

3rd.

And for a further cause of answer, defence, counter-claim, cross-complaint, and af-ermative relief against said plaintiff and the other defendants in this action, this defendant avers:

That the plaintiff and this defendant are residents of the county of Cochise, Territory of Arizona, and the defendants A. J. Mehan, Dewitt C. Turner, and Bell H. Chandler are residents of Pueblo, State of Colorado, and the defendant F. C. Fisher is a resident of Denver, State of Colorado.

That on the 11th day of April, 1890, and for more than five years prior thereto one James Daley and this defendant were husband and wife respectively and lived and cohabited together in Bisbee, county of Cochise aforesaid; that at the time of the marriage of said Daley and this defendant the said Daley owned no money or property of any kind and did not earn or acquire any money or property of any kind during the continuance of said marriage, and at the time of said marriage this defendant had three thousand dollars in United States coin and currency in her own right;
11 that during the continuance of said marriage and prior to the aforesaid 11th day of April, 1890, the said James Daley and this defendant used all the said sum of three thousand dollars in prospecting for, locating, and procuring, preserving, and maintaining title to mines and mining claims and interests in mining claims in Warren mining district, county of Cochise aforesaid, and on the said 11th day of April, 1890, this defendant owned the following-described mining claims and interests in mining claims situate in said Warren mining district, to wit: The "George Washington," located January 1st, 1887, recorded in Book 11, Record of Location of Mines, page 225.

The "Old Republican," located December 15th, 1888, recorded in Book 9, Record of Location of Mines, page- 84 and 85.

The "Copper Frying Pan," located January 22nd, 1889, recorded in Book 11, Records of Location of Mines, page 628.

The "Angel," located January 1st, 1887, recorded in Book 11, Record of Location of Mines, page 225.

An undivided half interest in and to the "Irish Mag," located January 1st, 1886, recorded in Book 11, Records of Locations of Mines, page 104; and an undivided one-third ($\frac{1}{3}$) interest in and to each of the following-named mining claims:

The "Copper Monarch," located July 28th, 1888, recorded in Book 11, Records of Locations of Mines, page 555.

12 The "Old Canteen," located January 1st, 1889, recorded in Book 9, Records of Location of Mines, pages 89 and 90.

The "Intervenor," located December the 24th, 1888, recorded in Book 11, Records of Locations of Mines, page 613.

The "Diadem," located January 24th, 1888, recorded in Book 11, Records of Locations of Mines, page 613; all of which records of locations are in the office of the county recorder of the aforesaid county of Cochise, and said records of locations are hereby specially refer-ed to for a more particular description of said mining claims, and said mining claims are the same as described in plaintiff's complaint.

That during all of the time of said coverture this defendant was uneducated and utterly ignorant of the language, laws, and customs of the United States of America and of this Territory, and the said James Daley was fairly well versed in the said language, laws, and customs, and this defendant, confiding and relying on the advice and direction of her said husband, advanced her said money to procure, preserve, and maintain the title to said mining claims and interests in mining claims on the direction and advice and at the request of her said husband, who took advantage of defendant'- said ignorance and of the confidence reposed in him by her and took and kept the title to all said mining claims and interests in mining claims
13 in his own name without the knowledge or consent of this defendant.

That on the aforesaid 11th day of April, 1890, all of this defendant's solid money, three thousand dollars, was invested in the mining claims and interests in mining claims hereinbefore described, and on that day the said James Daley left this defendant in the county aforesaid with the intention of abandoning her, and has not since returned to nor in any way communicated with this defendant.

That thereafter on the 2nd day of September, 1890, the said James Daley conveyed all said mining claims and interests in mining claims by deed duly acknowledged and recorded in the office of the county recorder of the aforesaid county of Cochise, in Book 11 of Record of Deeds of Mines, at page 226, to the defendant A. J. Mehan, who gave no value whatever therefore, and who, at the time of said conveyance and prior thereto, had full notice and knowledge of all the equities of this defendant as hereinbefore set out.

That the plaintiff, Adolph Cohn, claims to own all said mining claims and interests in mining claims by virtue of an attachment, judgment, execution sale thereunder, and constable's deed in the case "Adolph Cohn *vs.* A. J. Mehan," in justice court of precinct No. one of this county, which deed was duly acknowledged and recorded in the office of the county recorder of said county of Cochise, in Book 11 of Deeds of Mines, at page 291.

14 That said Adolph Cohn was the plaintiff in that action and the purchaser at said execution sale and gave no value for said purchase, and at the time of said purchase and long prior thereto had full notice and knowledge of all the equities of this defendant, as hereinbefore set out, and also had notice and knowledge that the said A. J. Mehan gave no value for his aforesaid conveyance of

September 2nd, 1890, and that said Mehan at and prior to taking his said conveyance had notice and knowledge of all the equities of this defendants, as hereinbefore set out; that on the 15th day of September, 1890, the said A. J. Mehan conveyed an undivided one-half interest in and to all said mining claims and interests in mining claims by deed duly acknowledged and recorded in the office of the county recorder of the aforesaid county of Cochise, in Book 11 of Deeds of Mines, at page 228, to the defendant Dewitt C. Turner, who have no value for said conveyance, and who, at and long prior to the time of taking the same, had notice and knowledge of all the equities of this defendant, as hereinbefore set out, and had notice and knowledge that his said grantor, A. J. Mehan, gave no value for his aforesaid conveyance of September 2nd, 1890, and that said A. J. Mehan at and prior to taking his said conveyance had notice and knowledge of all this defendant's equities, as hereinbefore set out.

15 That thereafter, on the 22nd day of November, 1890, the said A. J. Mehan conveyed an undivided one-third interest in and to all said mining claims and interests in mining claims by deed duly acknowledged and recorded in the office of the county recorder of the aforesaid county of Cochise, in Book 11 of Deeds of Mines, at page 240, to the defendant Bell H. Chandler, and thereafter, on the 8th day of January, 1891, the defendant Dewitt C. Turner conveyed an undivided one-sixth interest in and to the said mining claims and interests in mining claims to the defendant F. C. Fisher by deed duly acknowledged and recorded in the office of the county recorder of the county of Cochise, in Book 11 of Deeds of Mines, at page 273; that said defendants, Bell H. Chandler and F. C. Fisher, did not nor did either of them pay any value whatever for this said deeds or either of them, and the said defendants, Chandler and Fisher, at and prior to the time of taking their said deeds respectively each had full notice and knowledge of this defendant's equities, as hereinbefore set out, and had notice and knowledge that their grantors gave no value for their said deeds or either of them, and that both said Mehan and Turner, before taking their deeds, had notice and knowledge of this defendant's equities as herein set out; that on the 15th day of October, 1890, this defendant commenced an action in this court to obtain a decree of divorce from the bonds of matrimony theretofore and

16 then existing between this defendant and the said James Daley, and also to obtain a decree awarding her all the property in plaintiff's complaint and hereinbefore described and permitting this defendant to resume her former name, "Angela Dias," which action is entitled Angela Dias de Daley *vs.* James Daley, No. 1534; that hereafter such proceedings were had in that action that on the 14th day of May, 1891, this court duly gave and made a judgment and decree therein in favor of this defendant (plaintiff in that action) and against the said James Daley, dissolving the bonds of matrimony theretofore existing between the said Daly and this defendant and awarding to her all the property here-

inbefore described and permitting her to resume her former name, "Angela Dias."

Wherefore this defendant prays a judgment and decree of this court: 1st. That this defendant is the owner of all the mining claims and interests in mining claims in plaintiff's complaint and hereinbefore set out and described.

2nd. That the plaintiff has no right, title, or interest in or to said mining claims or interests in mining claims or any of them.

3rd. That the defendants A. J. Mehan, Dewitt C. Turner, Bell H. Chandler, and F. C. Fisher have not nor has either or any of them any right, title, or interest in or to said mining claims or interests in mining claims or any of them.

4th. That the constable's deed to plaintiff and the deed of
17 James Daley to defendant Mehan and of defendant Mehan to defendants Turner and Chandler and the deed of said Turner to defendant Fisher as hereinbefore described, be and that each of them be cancelled of record and for nought held, and that this defendant's title to all said property be quieted, and that said decree be in favor of this defendant by her proper name, "Angela Dias."

5th. And for such other *and* judgment and decree as may appear equitable, and for costs of this action.

JAMES RIELLY,
Attorney for Defendant Angela Dias.

Endorsed: No. 1614. Title of court and cause. Amended answer. Service accepted Nov. 9th, 1891. M. A. Smith. Filed November 10th, 1891. A. H. Emanuel, clerk.

Title of Court and Cause.

Dem. & Ans. to Def't's Amended Answer.

Now comes the said plaintiff, and to the third paragraph of the amended answer of the defendant Angela Dias de Daley, in which paragraph she sets up a counter-claim and cross-complaint
18 and asks for affirmative relief against the said plaintiff, says that the said cross-complaint and counter-claim and demand for affirmative relief does not state facts sufficient to constitute a cause of action or sufficient to constitute a basis for any relief. Wherefore he prays judgment as to the same.

And for answer to said paragraph setting up said counter-claim plaintiff denies each and every allegation thereof.

Wherefore he prays judgment.

M. A. SMITH,
W. H. BARNES,
W. C. STAEHLE,
Plaintiff's Attorneys.

Endorsed: No. 1614. Title of court and cause. Dem. & ans. to amended ans. Filed May 26th, 1892. A. H. Emanuel, clerk.

Title of Court and Cause.

Motion to Suppress.

And now comes the plaintiff and moves the court to suppress the deposition of A. J. Mehan herein filed for the reason, 1st, that there is no affidavit that the witness Mehan resides without
19 the Territory of Arizona or county of Cochise, where the suit is pending, or more than fifty miles from the place of trial.

BARNES & STAHLE.

Endorsed: No. 1614. Title of court and cause. Motion to suppress. Filed May 26th, 1892. A. H. Emanuel, clerk.

Title of Court and Cause.

Supplemental Amendment to Answer of Defendant Angela Dias.

And now comes the defendant Angela Dias, sued in this action by the name of Angela Dias de Daley, and, by leave of the court first had, files this her supplemental amendment to her amended answer and cross-complaint, heretofore, on the 10th day of November, 1891, filed in this action, as follows, to wit, amend defendant's cross-complaint herein by inserting on page 9 of this defendant's answer and cross-complaint, on line four, after the words "former name, Angela Dias," and immediately before the prayer, the
20 following, to wit: "And this defendant, for further and supplemental answer to plaintiff's said complaint, avers that on the 18th day of October, 1890, and before the plaintiff, Adolph Cohn, bought the premises and property in his complaint herein and in the cross-complaint of this defendant described and set out, this defendant commenced an action in this court, numbered 1535, against James Daley and Andrew J. Mehan, the predecessors and grantors of plaintiff herein, and the defendant Dewitt C. Turner, to quite title to all the mines and mining claims in plaintiff's complaint and in the cross-complaint of this defendant set out and described, and on the said 18th day of October, 1890, and after the commencement of said action, this defendant caused to be filed and recorded in the office of the county recorder of this county where said property is situate a notice of the pendency of said action containing the names of the parties thereto, the object thereof, and a description of the property affected by said suit; that thereafter such proceedings were had in said action that on the 26th day of May, 1892, this court duly gave and made a judgment and decree in said action" that this defendant, plaintiff in that action, was the owner of all the mines and mining claims in the complaint in that action in plaintiff's complaint herein and in a cross-complaint of this defendant in this action set out and described and quieting the title of this defendant, plaintiff in that action, to all said mines and
21 mining claims against said James Daley and Andrew J. Mehan, plaintiff's predecessors and grantors, and Dewitt C.

Turner, and against all persons claiming from or under them or either of them by title subsequent to the filing and recording of said notice.

That said plaintiff, Adolph Cohn, took title from said Andrew J. Mehan after the filing and recording of said notice to all said mines and mining claims, and has no other title to the same nor to any or either of said mines and mining claims.

JAMES REILLY,
Att'ys for Def't Angela Dias.

Endorsed: No. 1614. Title of court and cause. Supplemental amendment to answer of defendant Angela Dias. Filed by leave of court this 28th day of May, 1892. A. H. Emanuel, clerk.

Title of Court and Cause.

It is ordered and decreed that the default of A. J. Mehan, Dewitt C. Turner, Bell H. Chandler, and F. C. Fisher, defendants herein, be, and the same hereby is, entered.

Dated May 24th, 1892.

22 Title of Court and Cause.

This being the day regularly set for the trial of this cause, comes now the plaintiff, by Messrs. W. C. Stahle and W. H. Barnes, of counsel, and comes now the defendant Angela Dias (or Angela Dias de Daley), by her attorney, James Reilly, Esq., and now, on motion of said James Reilly, the name of A. R. English, Esq., is ordered entered as counsel with said defendant herein, and a demurrer having — filed by said defendant, Angela Dias, to the complaint filed herein and coming now to be heard, and the court having now heard the arguments of the respective counsel thereon, it is now ordered that said demurrer be, and the same hereby is, sustained, with leave to amend said complaint *the said complaint;* whereupon the said complaint was immediately amended and the trial proceeded before the court sitting without a jury. On motion of said defendant, it is ordered that she have leave to amend her cross-complaint herein, which she accordingly does, and her amended cross-complaint is deemed filed as of this date. The plaintiff then, to maintain upon his part the issue herein, offered certain documentary evidence and the oral evidence of the witnesses W. F. Bradley and Charles G. Johnston, who were duly sworn and examined, and thereupon the plaintiff rested his case. The defendant Angela Dias, then
23 to maintain upon her part the issue herein, offered certain documentary evidence and the witnesses James Reilly, Angela Dias, R. P. Stevens, who were duly sworn and examined, and after offering the deposition of A. J. Mehan said defendant rests her case. The plaintiff in rebuttal offers the testimony of Frank Broad, Angela Dias, J. F. Duncan, S. Tribolet, A. Cohn, and W. F. Bradley and certain documentary evidence, and there rests his case in rebuttal.

The defendant then in *in* surrebuttal recalled and examined James Reilly; whereupon the case and all evidence was declared

closed, and there being no further evidence, the trial proceeded upon the argument of the respective counsel until the usual hour of adjournment for the day, when a recess was taken herein until tomorrow morning at 9 o'clock.

Dated May 27th, 1892.

Title of Court and Cause.

The trial herein proceeds upon the argument of counsel for the respective parties, and the same being now fully presented and argued and submitted to the court, the same is now taken under advisement, with leave to the parties to file briefs.

Dated May the 28th, 1892.

24 Title of Court and Cause.

This cause having been tried and submitted at a prior term of this court, and the court, having taken the same under advisement and being now fully advised herein, does find the issue herein in favor of the defendant Angela Deias and against the plaintiff, A. Cohn, and does hereby order that judgment be entered accordingand for costs. The said plaintiff thereupon gives notice of motion for new trial herein.

Dated November 22nd, 1892.

Title of Court and Cause.

Comes the parties hereto, by their attorneys of record, and fully argue and submit to the court the motion for a new trial herein, and the court does now take the same under advisement.

Dated Nov. 25th, 1892.

25 Title of Court and Cause.

The court, having taken under advisement the motion for a new trial herein and being now fully advised in the premises, does now overrule and deny said motion; to which ruling of the court plaintiff, by his counsel, instantly excepts and gives notice of appeal therefrom and from the judgment of the court herein to the supreme court, and the court does hereby grant to said plaintiff thirty days after the adjournment of this term to file his statement of facts herein.

Dated Nov. 26th, 1892.

Title of Court and Cause.

Decree Qui-ting Title.

This cause came on regularly to be heard in open court on the 27th day of May, 1892, William C. Staehle and W. H. Barnes, Esqs., appearing for the plaintiff, and James Reilly and Allen R. English, Esqs., appearing for the defendants Angela Dias, sued in plaintiff's complaint by the name of Angela Dias de Daley, and the defend-

ants A. J. Mehan, Dewitt C. Turner, Bell H. Chandler, and F. C Fisher not appearing.

The court having heard all the evidence and proofs produced by the respective parties appearing herein, and having taken
26 the same under advisement, and having duly considered the same, and being now fully advised in the premises, and it appearing therefrom to the satisfaction of the court:

First. That the defendants A. J. Mehan, Dewitt C. Turner, Bell H. Chandler, and F. C. Fisher have each of them duly and regularly — summoned to answer unto plaintiff's complaint herein and have each made default in that behalf, and that the default of each of said defendants for not appearing and answering has been duly and regularly entered herein.

Second. That the proper name of the defendant sued by plaintiff under the name of "Angela Dias de Daley" is Angela Dias.

Third. That the allegation of plaintiff's complaint that plaintiff is the owner and entitled to the possession of the mining claims described in his complaint is not true.

Fourth. That said plaintiff does not own said mining claims nor any of them nor any interest in them nor in any of them.

Fifth. That each and every of the allegations of the cross-complaint and of the supplement to said cross-complaint of the said defendants, Angela Dias, are true, and that she is the owner and entitled to the possession of all the mining claims and interests in mining claims in her said cross-complaint in the plaintiff's complaint in this action and hereafter named and described, and is entitled to have a decree of this court quieting and settling her title thereto.

27 Now, therefore, it is ordered, adjudged, and decreed that the said defendant, Angela Dias, is the owner and entitled to the possession of all the mining claims and interests in mining claims in the cross-complaint in plaintiff's complaint in this action and hereinafter set out, named, and described as against said plaintiff, Adolph Cohn, and against each and every of the defendants A. J. Mehan, Dewitt C. Turner, Bell H. Chandler, and F. C. Fisher.

And her title thereto is hereby settled and quieted as against said plaintiff and said defendants and each and every of them and all persons claiming or to claim under them or under any or either of them; and it is further ordered, adjudged, and decreed that said defendant, Angela Dias, do have and recover of and from the said plaintiff, Adolph Cohn, her costs incurred in this suit, taxed at $91.55.

The lands, premises, mining claims, and interests in mining claims affected by this decree are situate in the Warren mining district, Cochise county, Territory of Arizona, and described, to wit:

The "George Washington" mining claim, located Jan. 1st, 1887, and recorded in Book 9 of Records of Location of Mines, at page 225, in the office of the county recorder of the aforesaid county of Cochise.

The "Old Republican" mining claim, located December
28 15th, 1887, and recorded in Book 9 of Records of Locations of Mines, at pages 84 and 85, in the office of the county recorder of the said county of Cochise.

The "Copper Frying Pan" mining claim, located January 22nd, 1889, and recorded in Book 11 of Records of Locations of Mines, at page 628, in the office of the county recorder of the aforesaid county of Cochise.

The "Angel" mining claim, located January 1st, 1887, and recorded in Book 11 of Records of Location of Mines, at page 225, in the office of the county recorder of the aforesaid county of Cochise.

An undivided one-half interest in and to the "Irish Mag" mining claim, located January 1st, 1886, and recorded in Book 11 of Records of Locations of Mines, at page 104, in the office of the county recorder of the aforesaid county of Cochise, and an undivided one-third interest in and to the "Copper Monarch" mining claim, located July 28th, 1888, and Recorded in Book 11 of Records of Mining Locations, at page 555, all which records of — are hereby referred to for a further description of said mining claims.

RICHARD E. SLOAN, *Judge.*

Endorsed: No. 1614. Title of court and cause. Decree quieting title. Filed Nov. 25th, 1892. A. H. Emanuel, clerk.

29 PUEBLO, COLO., *Aug.* 4, 1891.

Cohn Brothers, Tombstone, Ariz.

GENTLEMEN: I once more write to you to try and gain some information in regards to what was done in our case, and if you received a deed to the property, and, if so, have you got it in your possession yet; I trust that you have, as it will save litigation; I have worked hard to try and send you your money, but it has been such hard times in trying to make a sale of property that it has delayed me, but I think that I may be able to complete a sale in the next few days, and, if so, I am willing to pay the amount I owe you. I trust that you will give me a reply at your earliest attention, as I will not be here but a few days. I remain,

Yours resp., A. J. MEHAN.

(Endorsement on envelope:) Return to A. J. Mehan, Center Block hotel, El Paso, Texas. James Reilly, Esq., Tombstone, Arizona.

Endorsed: No. 1614. Exhibit. Filed May 27th, 1892. A. H. Emanuel, clerk.

30 Title of Court and Cause.

Bill of Exceptions.

Be it remembered that on the 27th day of May, 1892, the above cause came on regularly for trial, and during the progress thereof the following proceedings were had, as more fully appears in the statement of facts filed herein, expressly referred to, and the excep-

tions to rulings of court as therein shown are made a part of this bill of exceptions.

Exceptions by plaintiff to the rulings of the court as shown in the statement of facts were taken at the time such rulings were made.

I.

The defendant- offered in evidence the deposition of A. J. Mehan; to which the plaintiff objected on the ground of no showing of Mehan's absence. The court overruled the objection, and plaintiff then and there excepted.

II.

The defendant-, after trial had commenced, offered an amended answer setting up the judgment in the case of Daly *vs.* Daly *et al.* quieting title in favor of Mrs. Daly against any claim of defendants in said action. The plaintiff objected to such amended an-
31 swer. The court overruled the objection, and plaintiff excepted.

III.

Defendant- offered in evidence the judgment-roll in case No. 1534, of Angela Dias de Daly *vs.* James Daly; to which offer the plaintiff then and there excepted on the ground that it was immaterial in this case, and the court overruled the objection; to which ruling the plaintiff excepted.

IV.

Defendant- then offered in evidence the judgment-roll in case of Angela Dias de Daley *vs.* James Daley, A. J. Mehan, *et al.*, No. 1535; to which plaintiff objected on the ground that the same was immaterial, irrelevant, and incompetent; which objection the court overruled, and plaintiff then and there excepted.

V.

The *lis pendens* filed in said case was likewise offered, and the same was objected to as immaterial; which *ruling* the court overruled, and plaintiff then and there excepted.

VI.

After certain testimony as to absence of Mehan, defendant- offered in evidence the deposition of A. J. Mehan; to which plaintiff objected on the ground that parol evidence cannot vary a deed, and that he could not be heard to dispute his title against a judgment creditor; which objection the court overruled, and plaintiff then and there excepted to the ruling, as fully appears in the state of facts.

32 VII.

The defendant- introduced Angela Dias de Daley; to whose testimony plaintiff objected on the ground that it was immaterial, incompetent and irrelevant, and inadmissable; which objection the court overruled, and plaintiff excepted.

VIII.

The defendants' counsel asked said Angela Daley: "In whose name did you suppose these mines were located?" which question was objected to as immaterial, and the objection was overruled and exception noted, and the answer, "In my name."

IX.

Defendant- questioning: "Why did you suppose that?" Same objection, same ruling and exception. Answer. "Because they were prospected with my money." Question by defendant-: "Did Mr. Daley tell you anything about it?" Objected to as heresay and as incompetent. Objection overruled, and exception taken.

X.

Be it further remembered that on the cross-examination of the witness Angela Dias she was asked the following question by counsel for plaintiff, viz:

Did you not swear as a witness on that cor-ner's inquest (referring to the inquest held on the body of one Lowther), in the presence of S. C. Perrin, that you were not the wife of James Daley?

33 Objected to by Mr. Barnes. It is for the purpose of contradicting her and testing her veracity.

By the Court: You cannot contradict her upon an immaterial point.

By Mr. Barnes: I want to show that she swore upon that inquest that she was not James Daley's wife, but that she lived with him five years as housekeeper. It is to impeach the witness.

By the Court: It cannot be material except as to the marriage, and the status of the parties was fixed by the divorce.

Exception by plaintiff.

XI.

The plaintiff offered to prove by Frank Broad (page 50, Transcript) that Mehan had made statements contradictory of the statements contained in his deposition. The defendant- objected, and the court sustained the objection, and plaintiff then and there excepted.

XII.

Afterwards, to wit, on the 26th day of November, 1892, the court rendered judgment in favor of defendant Angela Dias and against plaintiff, and thereafter and within the statutory time plaintiff filed his motion for a new trial, which said motion appears in this record and made a part of this bill of exceptions, as follow-, viz:

34 Title of Court and Cause.

Motion for a New Trial and to Set Aside the Judgment.

Now comes the plaintiff, Adolph Cohn, and moves the court to set aside the judgment and grant a new trial of the above cause, and assigns therefore the following grounds, to wit:

1st. The court erred in the admission of irrelevant and incompetent testimony in that the court admitted in evidence the deposition of A. J. Mehan, which said deposition is in all respects irrelevant to any issue raised in the pleadings; that said testimony should have been excluded because in it is contained statements invalidating his title and is otherwise irrelevant and incompetent.

2nd. The court erred in refusing to allow testimony tending to contradict statements made in Mehan's deposition.

See Broad's test'y in transcript.

3rd. The court erred in refusing to permit the evidence of the defendant Mrs. Daley given before the coroner's jury in the inquest held on the body of one Lowther, which testimony tended to show that she was never married to Daley; and on the further ground that the said deposition before the coroner tended to contra-
35 dict the statements made by the said defendant on the trial of the said cause.

See page 54, Transcript.

4th. The court erred generally in admitting improper evidence and refusing to admit proper and competent evidence; to which ruling exception was taken at the time.

5th. The judgment should be set aside and a new trial granted, because it is not sustained by the evidence in that (*a*) the evidence does not support the judgment, because there is no evidence showing any facts which in law creates a resulting trust in favor of the defendant Mrs. Daley; (*b*) the evidence fails to show that plaintiff had any actual or constructive notice of any equities in the defendant Mrs. Daley at the time of the attachment by plaintiff Cohn or at the time of purchase of the property by him; (*c*) the evidence, on the contrary, shows that plaintiff Cohn was an innocent purchaser for a valuable consideration and without notice; (*d*) the evidence shows that any money advanced by Mrs. Daley was a loan, and no trust could result in her favor; (*e*) the testimony of Mrs. Daley shows at best that it was community property and not separate estate; (*f*) there is no testimony tracing the money claimed as the separate property of Mrs. Daley to any particular piece of property in controversy in this action; (*g*) the evidence of Mrs. Daley shows that Mr. and Mrs. Daley located the property after
36 marriage, and the act of location made the property community property, subject to the disposal of the husband.

See Transcript, pg. 35 & 36.

(*h*) the evidence shows that all money expended by Mrs. Daley was subsequently spent for support of the family and for assessment-work on the mines, no trust resulting.

See Transcript, pg. 37.

6th. The court erred in admitting in evidence the record in the divorce suit, Daley *vs.* Daley.

7th. The court erred in admitting the record in the case of Daley *vs.* Daley *et al.*, the plaintiff not being bound by it.

8th. The court erred in refusing to permit plaintiff to show that Mr. and Mrs. Daley were not husband and wife at the time of the location of the claims in controversy.

9th. The court erred in permitting in evidence *of* the *lis pendens* filed by Mrs. Daley after the attachment by Cohn and filed in and to which Cohn was not a party.

10th. The judgment is not supported by the evidence (1st) in that Mehan's testimony was irrelevant, and (2nd) if relevant it was broken down by testimony as to his reputation for truth and veracity, and by proof of contradictory statements made elsewhere; (3) the burden of proof being on defendants to prove a trust in favor of Mrs. Daley, there is no evidence in the record tending to show facts from which any trust could result.

37 11th. The evidence shows that the plaintiff Cohn was at the time of filing this suit the owner of the property described in the complaint.

Wherefore it is respectfully submitted that the judgment be set aside and a new trial granted to plaintiff in this cause.

WM. H. BARNES,
M. A. SMITH,
WM. C. STAHLE,
Attorneys for Plaintiff.

Endorsed: No. 1614. Title of court and cause. Motion for a new trial and to set aside judgment. Filed November 25th, 1892. A. H. Emanuel, clerk.

The court overruled the motion for a new trial on all the grounds therein stated; to which ruling of the court plaintiff then and there excepted and still excepts, and presents this his bill of exceptions and asks that the same be signed and allowed, and it is done accordingly.

BARNES & MARTIN,
M. A. SMITH, &
W. C. STAEHLE,
Att'ys for Plaintiff.

38 The foregoing bill of exceptions *were* presented to me for allowance on this 1st day of December, 1892, and on this day forwarded by mail to James Reilly, Esq., counsel for defendants, for inspection.

RICHARD E. SLOAN, *Judge.*

The foregoing bill of exceptions having been submitted by plaintiff on the 1st day of December, 1892, to the judge trying the cause and having been by him submitted to the counsel for defendants, and the objections thereto made by said counsel for defendant having been heard and considered *was* on this 15th day of December, 1892, the same is settled, allowed, signed, and made a part of the record of this case.

RICHARD E. SLOAN, *Judge.*

Endorsed: No. 1614. Title of court and cause. Bill of exceptions. Filed Dec. 16th, 1892. A. H. Emanuel, clerk.

And on the 18th day of May, 1893, there was filed in said cause a statement of facts, which — in the words and figures following, to wit:

24, p. 257.

B. W. Tichenor (official court reporter), agent for the Hammond typewriter, Tucson, Arizona.

39 Statement of facts as completed. Filed May, 1893.
A. H. EMANUEL, *Clerk.*

In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Cochise.

ADOLPH COHN, Plaintiff,
vs.
ANDREW J. MEHAN ET AL., Defendants.

Transcript of shorthand notes of testimony, etc., taken from the trial of the above-entitled cause, at the court-room of said court, in the city of Tombstone, on Friday, the twenty-seventh day of May, A. D. 1892, at 9.30 o'clock a. m., before the court (Hon. Richard E. Sloan presiding) sitting without a jury, in the presence of W. C. Staehle, Esq., attorney for, and W. H. Barnes, Esq., of counsel with, plaintiff, and James Reilly, Esq., attorney for defendant Angela Dias de Daley; Allen R. English, Esq., for counsel.

Demurrer was argued and sustained by the court and the pleadings amended by leave to conform to ruling.

40 Plaintiff moved to suppress the deposition of A. J. Mehan on the ground that no affidavit of place of residence of said Mehan was made or filed in this cause before the said deposition was taken.

Motion denied. Plaintiff excepts.

The pleadings were then read by the respective counsel.

Mr. Reilly, on behalf of defendant, moved for leave to amend the cross-complaint and answer of Angela Diaz de Daily by inserting therein another cause of cross-complaint as follows: "That on the 18th day of October, 1890, this defendant Angela Diaz de Daily commenced an action in this court against James Daily, Andrew J. Mehan, and Edward C. Turner to quiet title to the property described in plaintiff's complaint and in this cross-complaint, and that on said day she filed a notice of the pendency of said action in the office of the county recorder of this county; that thereafter such proceedings were had in said action that afterwards and on the 26th day of May, 1892, this court duly made and gave a judgment and decree in favor of this defendant and against said James Daily, Andrew J. Mehan, and Edward C. Turner, quieting title to all said property against said defendants and all persons claiming from or

under them after the filing of said notice; that said Andrew J. Mehan is the same person mentioned in plaintiff's complaint
41 from whom the plaintiff in this action derived title."

(The said amendment was by the court permitted.)

Mr. Barnes, for plaintiff, asked leave to amend the complaint herein by pleading the jurisdiction of the district court.

The amendment was permitted.

Mr. Barnes, on behalf of plaintiff, thereupon offered in evidence the location notice of the George Washington mining claim, located by James Daily Jan. 1st, 1887, and recorded in Book 11, p. 225, of records of mining claims for the county of Cochise:

Location Notice.

Notice is hereby given that the undersigned, in compliance with the requirements of the mining act of Congress approved May 10th, 1872, *I* have this day located and claim fifteen hundred linear feet along the course of this lead, lode, or vein of mineral-bearing quartz and three hundred feet in width on each side of the middle of said lead, lode, or vein, situate in the Warren mining district, county of Cochise, Arizona, and more particularly described as follows, to wit:

Commencing at this monument of stones, being the center of the southeast end of claim and upon which this notice is posted, thence northeast 300 feet to a monument of stones, thence northwest 1,500 feet to a monument of stones, thence southwest 300 feet to a monument of stones, being the center of the northwest end of claim; thence southwest 300 feet to a monument of stones, thence south-
42 east 1,500 feet to a monument of stones, thence northeast 300 feet to the place of beginning.

This claim is situated in the Mule mountains, Warren mining district, Cochise county, Arizona, and about three-quarter mile east of the town of Bisbee, and shall be known as the George Washington mine, located January 1st, 1887.

Locator, JAMES DALY.

TERRITORY OF ARIZONA, }
County of Cochise. }

I, A. Wentworth, county recorder in and for the county of Cochise, hereby certify that the above and foregoing is a full, true, and correct copy of the George Washington mining claim location notice, as appears of record now in my office, in Book 11, page 628.

In witness whereof I have hereunto set my hand and affixed my official seal, at my office, in Tombstone, this 10th day of February, A. D. 1893.

[SEAL.]

A. WENTWORTH,
County Recorder.

Endorsed: Recorder's office, Tombstone, Cochise county, A. T. Filed and recorded at request of James Daley, January 3rd, A. D.

1887, at 9 a. m., Book 11, Records of Mines, page 225. Filed February 10th, 1893. W. F. Bradley, county recorder. Filed February 10th, 1893. A. H. Emanuel, clerk.

43 Also location notice of the Old Republican mining claim, located by James Daily Dec., 1888, and recorded in Book 9, p. 84, of records of mining claims for Cochise county, as follows, viz:

"B."

Location Notice.

Notice is hereby given that I, the undersigned, hereby locate and claim 1,500 feet on this lode, lead, or vein, together with 300 feet on each side of said vein, beginning at this monument of stones wherein this notice is posted, being the southeast center of said claim, thence three hundred feet in a northeasterly direction; thence 1,500 feet northwesterly to a monument of stones; thence 300 feet southwesterly to a monument of stones, being the northwest center of said claim; thence 300 feet southwesterly to a monument of stones; thence 1,500 feet in a southeasterly direction to a monument of stones; thence 300 feet northeasterly to the place of beginning. This claim lies in the Warren mining district, about 1 mile east of Bisbee, in Mule pass, and north of the county road running parallel with the claim known as the George Washington, and shall be known as the Old Republican. Dated on the ground this 15th day of December, 1888.

Locator, JAMES DALEY.

Witnesses:
W. G. WINSOR.

This claim is in the county of Cochise, Territory of Arizona.

44 TERRITORY OF ARIZONA, } ss:
County of Cochise, }

I, A. Wentworth, county recorder in and for the county of Cochise, do hereby certify that the above and foregoing is a full, true, and correct copy of the Old Republican mining claim location notice as appeares of record now in my office, in Book 9, page 84.

In witness whereof I have hereunto set my hand and affixed my official seal, at my office, in Tombstone, this 10th day of February, A. D. 1893.

[SEAL.]

A. WENTWORTH,
County Recorder.

(Endorsed:) 1614. Copy. Recorder's office, Tombstone, Cochise Co., A. T. Filed and recorded at request of James Daley, January 11th, A. D. 1889, at 10 a. m., Book 9, Record of Mines, page 84. W. F. Bradley, county recorder. Filed Feb. 10, 1893. A. H. Emanuel, clerk.

Also location notice of the Copper Frying Pan, located by James Daily, Feb. 7th, 1889, recorded in Book 11, p. 628, of records of mining claims for Cochise county, as follows, viz:

45 "C."

Location Notice.

Notice is hereby given that the undersigned, in compliance with the requirements of the mining act of Congress approved May 10th, 1872, have this day located and claim 1,500 linear feet along the course of this lead, load, or vein of mineral-bearing quartz and 100 feet from center of the claim — feet in width on each side of the middle of said lead, lode, or vein, situate in the Warren mining district, county of Cochise, Arizona, and more particularly described as follows, to wit: Commencing at this monument of stones, being the center of the east center of claim and upon which this notice is posted, thence runs north 100 feet to a monument of stones, thence west 1,500 feet to a monument of stones, thence runs south 100 feet to a monument of stones, being the center of west end of claim; thence east 1,500 feet to a monument of stones, thence 100 feet to the place of begin-ing. This claim joins the Sacramento on the north side line, and joins the south line of the Cleav-land, and on the east by the Stars and Stripes, and parallel of the north side of the Vet-ran, and running parallel of the south side line of the Angel, and about ¾ of a mile east of Bisbee, in the Mule pass, and shall be known as the Copper Frying Pan mine.

Located January 22nd, 1889.

JAMES DALEY.

46 TERRITORY OF ARIZONA, } ss:
County of Cochise, }

I, A. Wentworth, county recorder in and for the county of Cochise, do hereby certify that the above and foregoing is a full, true, and correct copy of the Copper Frying Pan mining claim location notice as appears of record now in my office, in Book 11, page 628.

In witness whereof I have hereunto set my hand and affixed my official seal, at my office, in Tombstone, this 10th day of February, A. D. 1897.

[SEAL.]

A. WENTWORTH,
County Recorder.

1614. Copy. Recorder's office, Tombstone, Cochise Co., A. T. Filed and recorded at request of James Daley, February 7, A. D. 1889, at 9 a. m., Book 11, Records of Mines, page 628. W. F. Bradley, county recorder. Filed Feb. 10, 1893. A. H. Emanuel, clerk.

Also location notice of the Iris May mining claim, located by Chas. Altschul and James Daily, Jan. 1st, 1886, and recorded in Book 11, p. 104, records of mining claims for Cochise county, as follows, viz:

"D."

Location Notice.

47 Notice is hereby given that the undersigned, in compliance with the requirements of the mining act of Congress approved May 10th, 1872, have this day located and claim 1,500 *hundred* linear feet along the course of this lead, lode, or vein of mineral-bearing quartz and 300 feet in width on each side of the middle of said lead, lode, or vein, situate in the Warren mining district, county of Cochise, Arizona, and more particularly described as follows, to wit:

Commencing at this monument of stones, being the center of the northeasterly end of claim and upon which this notice is posted, thence easterly 300 feet to a monument of stones; thence northerly 1,500 feet to a monument of stones; thence westerly 300 feet to a monument of stones, being the center of the southerly end of claim; thence westerly 300 feet to a monument of stones; thence northerly 1,500 feet to a monument of stones; thence easterly 300 feet to the place of beginning.

This claim is situated in the Mule Mountain mining district and about one-half mile from the Copper Queen smelter, southeasterly and running parallel with Keystone mine, and shall be known as the Irish May mining claim; located January 1st, 1886.

Locators: { CHAS. ANSHUTZ. JAMES DALEY.

Witness:
GEO. H. EDDLEMAN.

48 TERRITORY OF ARIZONA, *County of Cochise,* } ss:

I, A. Wentworth, county recorder in and for the county of Cochise, do hereby certify that the above and foregoing is a full, true, and correct copy of the Irish May mining claim location notice as appears of record in my office, in Book 11, page 104.

In witness whereof I have hereunto set my hand and affixed my official seal, at my office, in Tombstone, this 10th day of February, A. D. 1897.

[SEAL.]

A. WENTWORTH,
County Recorder.

Endorsed: 1614. Copy. Recorder's office, Tombstone, Cochise Co., A. T. Filed and recorded at request of Chas. Anshuls, January 6, A. D. 1886, at 11 a. m, Book 11, Record of Mines, page 104. W. F. Bradley, county recorder. Filed Feb. 10, 1893. A. H. Emanuel, clerk.

Also location notice of the Old Canteen mining claim, located by James Daily and others January 1st, 1889, and recorded in Book 9, p. 89, of records of mining claims for Cochise county, as follows, viz:

49 "E."

Location Notice.

Notice is hereby given that the undersigned, in compliance with the requirements of the mining act of Congress approved May 10th, 1872, *we* have this day located and claim fifteen hundred linear feet or less along the course of this lead, lode, or vein of mineral-bearing quartz and three hundred feet in width on each side of the middle of said lead, lode, or vein, situate in the Warren mining district, county of Cochise, Arizona Territory, and more particularly described as follows, to wit: Commencing at this monument of stones, being the center of the east end of claim and upon which this notice is posted, thence north 300 feet to a monument of stones, the same being placed against the southeast corner monument of the Cumberland mine; thence west 1,500 feet or less along the south side line of the Cumberland mine to the east side line of the Little New York mine to a monument of stones; thence south along the east side line of the Little New York mine three hundred feet to a monument of stones, being the west center end of claim; thence south along the east side line of the Little New York mine and to the north side line of the Virginins mine fifteen hundred feet or less to a monument of stones; thence north three hundred feet to place of beginning. This claim is situated in the Mule mountains and on the easterly slope in what is called Mule pass, about one and
50 one-half miles east of the town of Bisbee, and shall be known as the Old Canteen mine; located Jan. 1st, 1889.

JAMES DALEY.
CHARLES E. BARTHOLOMEW.
W. F. BRADLEY.

Witness-:
R. D. DICKEY.
JOHN A. LENOARD.

TERRITORY OF ARIZONA, } ss:
County of Cochise, }

I, A. Wentworth, county recorder in and for the county of Cochise, hereby certify that the above and foregoing is a full, true, and correct copy of the Old Canteen mining claim location notice, as appears of record now in my office, in Book 9, page 89.

In witness whereof I have hereunto set my hand and affixed my official seal, at my office, in Tombstone, this 10th day of February, A. D. 1893.

A. WENTWORTH,
County Recorder.

[SEAL.]

1614. Copy. Recorder's office, Tombstone, Cochise Co., A. T. Filed and recorded at request of James Daley, January 28th, A. D. 1893, at 10 a. m., Book 9, Records of Mines, page 89. W. F.
51 Bradley, county recorder. Filed Feb. 10, 1893, at — o'clock — m. A. H. Emanuel, clerk.

Also location notice of the Copper Monarch mining claim, located by James Daily and others July 28, 1888, and recorded in Book 11, p. 555, records of mining claims for Cochise county, as follows, viz:

"F."

Location Notice.

Notice is hereby given that the undersigned, in compliance with the requirements of the mining act of Congress approved May 10th, 1872, *we* have this day located and claim four hundred and ten linear feet along the course of this lead, lode, or vein of mineral-bearing quartz and three hundred feet in width on each side of the middle of said lead, lode, or vein, situate in the Warren mining district, county of Cochise, Arizona, and more particularly described as follows, to wit:

Commencing at this monument of stones, being the center of the southwest end of claim and upon which this notice is posted, thence easterly three hundred feet to a monument of stones; thence north four hundred and ten feet to a monument of stones; thence westerly three hundred feet to a monument of stones, being the center of the northeast end of claim; thence westerly three hundred feet to a monument of stones; thence southwest four hundred and ten feet to a monument of stones; thence easterly three
52 hundred feet to the place of beginning. This claim is a relocation of the gold-bearing mining claim, the owners of said claim having failed to perform their assessment-work for the year 1887. This claim is situated and running parallel with the Keystone mining claim and joins the Silver Spray mining claim and about a ¼ mile from the Holbrook mine, and shall be known as the Copper Monarch mine. Located on the ground July 28th, 1888.

Locators: { JAMES DALEY. CHARLES NUGENT. W. F. BRADLEY.

Witness:
J. DORAN.

TERRITORY OF ARIZONA, } ss:
County of Cochise, }

I, A. Wentworth, county recorder in and for the county of Cochise, do hereby certify that the above and foregoing is a full, true, and correct copy of the Copper Monarch mining claim location notice as the same appears of record now in my office, in Book 11, page 555.

In witness whereof I have hereunto set my hand and affixed my official seal, at my office, in Tombstone, this 10th day of February, A. D. 1893.

A. WENTWORTH,
County Recorder. [SEAL.]

1614. Copy. Recorder's office, Tombstone, Cochise Co., A. T. Filed and recorded, at request of James Daley, July 30, A. D. 1888, at 9 a. m., Book 11, Record of Mines, pages 555. W. F.
53 Bradley, county recorder. Filed Feb. 10, 1893, at — o'clock — m. A. H. Emanuel, clerk.

Also location notice of the Intervenor mining claim, located by James Daily and others Dec. 24th, 1889, and recorded in Book 11, p. 613, records of mining claims for Cochise county, as follows, viz:

"G."

Location Notice.

Notice is hereby given that the undersigned, in compliance with the requirements of the mining act of Congress approved May 10th, 1872, *we* have this day located and claim 1,500 (fifteen hundred) linear feet along the course of this lead, lode, or vein of mineral-bearing quartz and (300) three hundred feet in width on each side of the middle of said lead, lode, or vein, situate in the Warran mining district, county of Cochise, Arizona, and more particularly described as follows, to wit:

Commencing at this monument of stones, being the center of the west end of claim upon which this notice is posted, thence three hundred (300) feet to a monument of stones; thence east fifteen hundred (1,500) feet to monument of stones; thence south three hundred (300) feet to a monument of stones, being the center
54 of the east end of claim; thence south three hundred (300) feet to a monument of stones; thence west fifteen hundred (1,500) feet to a monument of stones; thence north three hundred (300) feet to the place of beginning. This claim is situated about one and one-half miles east of the town of Bisbee, in Mule gulch, and joins the Erie Cattle Co. mine on the west end, and shall be known as the Intervenor mine; located Dec. 24th, 1888.

JAMES DALEY.
CHARLES E. BARTHOLOMEW.
G. S. BRADSHAW.

Witness:
EDWARD KANE.

TERRITORY OF ARIZONA, } ss:
County of Cochise, }

I, A. Wentworth, county recorder in and for the county of Cochise, do hereby certify that the above and foregoing is a full, true, and correct copy of the Intervenor mining claim location notice, as appears of record now in my office, in Book 11, page 613.

In witness whereof I have hereunto set my hand and affixed my official seal, at my office, in Tombstone, this 10th day of February, A. D. 1893.

[SEAL.]

A. WENTWORTH,
County Recorder.

1614. Copy. Recorder's office, Tombstone, Cochise Co.,
55 A. T. Filed and recorded at request of Chas. E. Bartholomew January 19th, 1889, at 9 a. m., Book 11, Record of Mines, page 613. W. F. Bradley, county recorder. Filed Feb. 10, 1893, at — o'clock — m. A. H. Emanuel, clerk.

Also location notice of the Angel mining claim, located by James Daily, January 1st, 1887, and recorded in Book 11, p. 225, records of mining claims for Cochise county, as follows, viz:

"H."

Location Notice.

Notice is hereby given that the undersigned, in compliance with the requirements of the mining act of Congress approved May 10th, 1872, I have this day located and claim eight hundred linear feet along the course of this lead, lode, or vein of mineral-bearing quartz and three hundred feet on each side of the middle of said lead, lode, or vein, situate in the Warren mining district, county of Cochise, Arizona, and more particularly described as follows, to wit:

Commencing at this monument of stones, being the center of the west end of claim and upon which this notice is posted, thence north 300 feet to a monument of stones, thence east 800 feet to a monu-
56 ment of stones, thence south 300 feet to a monument of stones, being the center of the east end of claim; thence south 300 feet to a monument of stones, thence west 800 feet to a monument of stones, thence north 300 feet to the place of beginning. This claim is situated in the Mule mountains, Warren mining district, Cochise county, and about one-half mile east of the town of Bisbee, and shall be known as the Angel mine; located January 1st, 1887.

Locator, JAMES DALY.

TERRITORY OF ARIZONA, } ss:
County of Cochise, }

I, A. Wentworth, county recorder in and for the county of Cochise, do hereby certify that the above and foregoing is a full, true, and correct copy of the Angel mining claim location notice, as appears of record now in my office, in Book 11, page 225.

In witness whereof I have hereunto set my hand and affixed my official seal, at my office, in Tombstone, this 10th day of February, A. D. 1893.

A. WENTWORTH,
County Recorder.

[SEAL.]

1614. Copy. Recorder's office, Tombstone, Cochise Co., A. T. Filed and recorded at request of James Daly January 3rd, A. D. 1887, at 9 a. m., Book 11, Record of Mines, pages 225. W. F. Bradley, county recorder. Filed Feb. 10, 1893, at — o'clock —. m. A. H. Emanuel, clerk.

57 Also location notice of the Diadem mining claim, located by James Daily and others Dec. 24th, 1889, and recorded in Book 11, p. 613, records of mining claims for Cochise county as follows, viz:

"I."

Location Notice.

Notice is hereby given that the undersigned, in compliance with the requirements of the mining act of Congress approved May 10th, 1872, *we* have this day located and claim (1,500) fifteen — linear feet along the course of this lead, lode, or vein of mineral-bearing quartz and (300) three hundred feet in width on each side of the middle of said lead, lode, or vein, situate in the Warren mining district, county of Cochise, Arizona, and more particularly described as follows, to wit:

Commencing at this monument of stones, being the center of the east end of claim and upon which this notice is posted, thence north three hundred (300) feet to a monument of stones, thence west fifteen hundred (1,500) feet to a monument of stones, thence south three hundred (300) feet to a monument of stones, being the center of the west end of claim; thence south three hundred (300) feet to a monument of stones, thence east fifteen hundred (1,500) feet to a monument of stones, thence north three hundred (300) feet to the place of beginning.

This claim is situated about one and one-half miles east of the town of Bisbee, in Mule gulch, and joins the Erie Cattle
58 Co. mine on its south side and shall be known as the Diadem mine; located Dec. 24th, 1889.

JAMES DALY.
CHARLES E. BARTHOLOMEW.
G. S. BRADSHAW.

Witness:
EDWARD KANE.

TERRITORY OF ARIZONA, } ss:
County of Cochise, }

I, A. Wentworth, county recorder in and for the county of Cochise, do hereby certify that the above and foregoing is a full, true, and correct copy of the Diadem mining claim location notice, as appears of record now in my office, in Book 11, page 613.

In witness whereof I have hereunto set my hand and affixed my official seal, at my office, in Tombstone, this 10th day of February, A. D. 1897.

A. WENTWORTH,
County Recorder.

[SEAL.]

1614. Copy. Recorder's office, Tombstone, Cochise Co., A. T. Filed and recorded at request of C. E. Bartholomew January 19th, A. D. 1889, at 9 a. m., Book 11, Record of Mines, page 613. W. F. Bradley, county recorder. Filed Feb. 10, 1893, at — o'clock — m. A. H. Emanuel, clerk.

59 Also certified copy of deed from James Daley to Andrew J. Mehan, dated Sept. 2nd, 1890, conveying mining claims situated in the Warren mining district, Cochise Co., Ariz., known as George Washington, Republican, Copper Frying Pan, the Angel, one-half of the Irish Mag, one-third of Copper Monarch, one-third of Intervena, one-third — Old Canteen, and one-third of Diadem; which said deed is recorded in the office of the county recorder of Cochise county, in Book 11, p. 226, deeds of mines, and is as follows, viz:

"J."

Deed of Daly to Mehan.

This indenture made the 2nd day of September in the year of our Lord, one thousand eight hundred and ninety, between James Daley of the county of Pueblo, State of Colorado, party of the first part, and Andrew J. Mehan, of the county of Pueblo, State of Colorado, party of the second part; witnesseth, that the said party of the first part, for and in consideration of the sum of one hundred (100) dollars, lawful money of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, remised, released and forever quitclaimed and by these presents does grant, bargain, sell, remise, release and forever quitclaim unto the said party of the second part and to his heirs and assigns all the following-described mining claims, to wit: mining claim situated in Warren mining district, Cochise county, Territory of Ari-
60 zona known as "George Washington" mining claim situated in Warren mining district, Cochise county, Territory of Arizona known as the "Republican," mining claim situated in the Warren mining district, Cochise county, Territory of Arizona, known as "Copper Frying Pan," mining claim situated in Warren mining district, Cochise county Territory of Arizona, known as "the Angel," one-half of mining claim situated in Warren mining district, Cochise county, Territory of Arizona, known as "Irish Mag," one-third of mining claim situated in Warren mining district, Cochise county, Territory of Arizona, — "Copper Monarch," one-third of mining claim situated in Cochise county, Territory of Arizona, and Warren mining district, known as "Intervenor" one-third of mining claim situated in Warren mining district, Cochise county, Territory of Arizona, known as "Old Canteen," and one-third of mining claim situated in Warren mining district, Cochise county, Territory of Arizona, known as "Diadem," together with all the dips, spurs and angles, and also all the metals, ores, gold, and silver bearing quartz, rock and earth therein, and all the right, privileges and franchises thereto incident, appendant and appurtenant or therewith usually had and enjoyed.

And also all — singular the tenements, hereditaments and appurt-nces thereunto belonging, or in anywise appertaining, and the rents, issues, and profits thereof; and also all the estate, right, title,

interest, property, possession, claim and demand whatsoever,
61 as well in law as in equity, of the sadd party of the first part, of, in or to the said premises, and every part and parcel thereof, with the appurtenances.

To have and to hold, all and singular the said premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part, his heirs and assigns forever.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

JAMES DALEY. [SEAL.]

Signed, sealed, and delivered in the presence of—
S. H. WHITE.

STATE OF COLORADO, } ss:
County of Pueblo, }

I, S. Harrison White, notary public in and for said county, in the State aforesaid, do hereby certify that James Daley, who is personally known to me to be the person whose name is subscribed to the foregoing deed, appeared before me this day in person and acknowledged that he signed, sealed, and delivered the said instrument of writing as his free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this 2nd day of September, A. D. 1890.

S. HARRISON WHITE,
Notary Public. [SEAL.]

Filed and recorded at request of A. J. Mehan, September
62 11th, A. D. 1890, at 1 p. m.

W. F. BRADLEY,
County Recorder.

TERRITORY OF ARIZONA, } ss:
County of Cochise, }

I, W. F. Bradley, county recorder in and for the county of Cochise, do hereby certify that the above and foregoing is a full, true, and correct copy of a deed from James Daley to A. J. Mehan, as appears of record now in my office, in Book 11, page 226, deeds of mines.

In witness whereof I have hereunto set my hand and affixed my official seal, at my office, in Tombstone, this 23rd day of May, A. D. 1892.

W. F. BRADLEY,
County Recorder.

[SEAL.]

Endorsed: No. 1614. Title of court and cause. Deed, Daley to Mehan. Filed May 24th, 1892. A. H. Emanuel, clerk.

Also certified copy of deed from A. T. Carr, constable, precinst No. 1, Cochise Co., to A. Cohn, of Tombstone, for all right, title,

and interest of Andrew J. Mehan in the following mining claims in Warren mining district severally known and located as the "George Washington" M. C., "Copper Frying Pan" M. C., "Angel"
M. C., "Irish Mag" M. C., "Copper Monarch" M. C., "Inter-
63 venor" M. C., "Old Canteen" M. C., and "Diadem" M. C., etc., sold by virtue of a writ of execution, dated Sept. 29th, 1890, in favor of said Cohn and against said Mehan:

"K."

This indenture made the first day of May in the year of our Lord one thousand eight hundred and ninety-one, between S. T. Carr, constable, precinct No. one, county of Cochise, Territory of Arizona, the party of the first part, and A. Cohn of the city of Tombstone, county of Cochise, Territory of Arizona, the party of the second part, whereas by virtue of a writ of execution issued out of and under the hand of Chas. G. Johnson, Esq., justice of the peace, in and for precinct No. one, county of Cochise, Territory of Arizona, tested the 29th day of September, 1890, upon a judgment recovered in said court on the 29th day of September, 1890, in favor of A. Cohn as plaintiff and against A. J. Mehan, defendant to the said constable directed and delivered commanding him that out of the personal property of said judgment debtor in his said county, he should cause to be made certain moneys in the said writ specified and if sufficient personal property of the said judgment debtor could not be found, then he should cause the amount of said judgment to be made out of the real property belonging to said judgment debtor on the 13th day of September, 1890, or at any time afterwards; and whereas, because sufficient personal property of the said judgment debtor could not be found, whereof, the said constable could cause to be made the moneys specified in
64 said writ the said constable did, in obedience to said command, levy on, take and seize all the right, title, interest and claim which the said judgment debtor so had, of, in, and to the lands, tenements, real estate and premises hereinafter particularly set forth and described, with the appurtenances and did, on the 27th day of October, 1890, sell all the right, title, interest and claim of the said judgment debtor in and to the said premises at public auction in front of the court-house in the city of Tombstone, in said county of Cochise, Territory of Arizona, between the hours of nine in the morning and five in the afternoon of that day, namely at 12.30 o'clock p. m., after having given due notice of the time and place of such sale by publication and posting according to law, at which sale all the estate, right, title, interest and claim of said judgment debtor in and to the said premises were struck off and sold to the said party of the second part, for the sum of three hundred and forty-nine and $\frac{55}{100}$ ($349.55) dollars, lawful money of the United States of America, the said party of the second — being the highest bidder, and that being the highest sum bid for the same; whereupon the said constable after receiving from the said purchaser the said sum so bid as aforesaid, gave to the said party

of the second part such certificate of said sale as by law directed to be given and a duplicate of such certificate was duly filed by the said constable in the office of the recorder of said county of Cochise, A. T. And whereas six
65 months after said sale have expired without any redemption of the said premises having been made: Now this indenture witnesseth: that the said S. T. Carr, constable aforesaid, by virtue of the said writ, and in pursuance of the statute in such cases made and provided for and in consideration of the said sum to him in hand paid as aforesaid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, conveyed and confirmed and by these presents does grant, bargain, sell, convey and confirm unto the said party of the second part and to his heirs and assigns forever, all the estate, right, title, interest and claim which the said judgment debtor A. J. Mehan had on the said 13th day of September, 1890, or at any time afterwards, or now has, in and to all those certain lots, pieces or parcels of land, situate, lying and being in the said county of Cochise, Territory of Arizona, and bounded and particularly described as follows, to wit:

The following mining claims in Warren mining district, severally known and located as the "George Washington" M. C., "Old Republican" M. C., "Copper Monarch" M. C., "Copper Frying Pan" M. C., "Angel" M. C., "Irish Mag" M. C., "Copper Monarch" M. C., "Intervenor" M. C., "Old Canteen" M. C., and "Diadem" M. C. All of which said mining claims are duly recorded in the recorder's office of Cochise county, A. T., to which records reference is hereby expressly made and constitute the particular description of said several mining claims and made a part of this indenture.

66 Together with all and singular the tenements, herid-taments and appurtenances thereunto belonging or in anywise appertaining.

To have and to hold the said premises with the appurtenances unto the said party of the second part his heirs and assigns forever, as fully and absolutely as he the said constable can, may, or ought to, by virtue of the said writ and of the statute in such case made and provided grant, bargain, sell, convey and confirm the same.

In witness whereof, the constable, the said party of the first part has hereunto set his hand and seal, the day and year first above written.

S. T. CARR, [SEAL.]
Constable, Precinct No. 1, *County of Cochise, Territory of Arizona.*

Signed, sealed, and delivered in the presence of—
W. C. STAEHLE.

TERRITORY OF ARIZONA, } ss:
County of Cochise, }

On this fourth day of May, A. D. 1891, personally appeared before me, W. C. Staehle, a notary public in and for the county of

Cochise, Territory of Arizona, the within-named S. T. Carr, constable, precinct No. 1, county of Cochise, A. T., known to me to be the person described in and whose name is subscribed to the within instrument, and he as such constable acknowledged
67 to me that he as such constable of precinct No. 1, county of Cochise, A. T., executed the same for the uses, purposes, and consideration therein mentioned.

In witness whereof I have hereunto set my hand and affixed my notarial seal, at my office, in Tombstone, Cochise county, Arizona Territory, the day and year in this certificate first above written.

W. C. STAEHLE,
Notary Public. [SEAL.]

Filed and recorded at request of A. Cohn May 4th, A. D. 1891, I. P.

W. F. BRADLEY,
County Recorder.

TERRITORY OF ARIZONA, } ss:
County of Cochise, }

I, W. F. Bradley, county recorder in and for the county of Cochise, do hereby certify that the above is a full, true, and correct copy of a deed from S. T. Carr, constable, to A. Cohn, as appears of record now in my office, in Book 11, page 291, deeds of mines.

In witness whereof I have hereunto set my hand and affixed my official seal, at my office, in Tombstone, this 23rd day of May, A. D. 1892.

W. F. BRADLEY,
[SEAL.] *County Recorder.*

Endorsed: No. 1614. Certified copy of deed from S. T. Carr, constable, to A. Cohn. A. Cohn *vs.* A. J. Mehan *et al.* Filed May 24th, 1892. A. H. Emanuel, clerk.

The certified copy aforesaid was objected to on the ground that it was secondary evidence, the original of said deed being in
68 the possession of plaintiff.

Mr. Barnes thereupon introduced and offered in evidence the original of said deed.

Objected to on the ground that it described no property.

Admitted, subject to objection, said objection to be presented and argued on final hearing of the case.

Mr. W. F. BRADLEY, a witness called and sworn on behalf of plaintiff, testified as follows:

Direct examination.

By Mr. BARNES:

Q. What office do you hold, Mr. Bradley?
A. County recorder.

Q. Of Cochise county, Arizona?
A Yes, sir.
Q. (Exhibiting several papers.) Are these papers in your custody as such recorder?
A. Yes, sir.
Q. And the date of filing is endorsed on them by you?
A. Yes, sir.

By Mr. BARNES: Now, I will offer these papers referred to by Mr. Bradley in evidence. The first is the writ of attachment in the case of Cohn *v.* Daley in the justice's court. It is filed September 13th, 1890. I offer the paper and the file-mark, and will have a certified copy of it made and left with the clerk as an exhibit in this case, and is as follows, viz:

Ex. "L."

In the Justice's Court of Precinct No. One, County of Cochise, Territory of Arizona.

69 A. COHN, Plaintiff, *vs.* A. J. MEHAN, Defendant. } Writ of Attachment. Demand, $299.00.

The Territory of Arizona to the sheriff or any constable of Cochise county, Greeting:

We command you that you attach forthwith so much of the property of A. J. Mehan, if to be found in your county repleviable, on security, as shall be of value sufficient to make the sum of two hundred and ninety-nine ($299.00) dollars and the probable costs of this suit, to satisfy the demand of A. Cohn, and that you keep and secure in your hands the property so attached, unless replevied, that the same may be liable to further proceedings thereon to be had before the court, and that you make return of this writ, showing how you have executed the same.

Given under my hand, at my office, in said precinct No. one, this 13th day of September, 1890.

CHARLES G. JOHNSON,
Justice of the Peace.

TERRITORY OF ARIZONA, } ss:
County of Cochise, }

I hereby certify and return that I received the within writ on the 13th day of September, 1890; that I executed the same by levying upon the following-described property, to wit, being mining claims in Warren mining district, Cochise county, Territory
70 of Arizona, known and located as "George Washington," "Old Republican," "Copper Frying Pan," "Angel," "Irish Mag," "Copper Monarch," "Intervenor," "Old Canteen," and "Diadem" mining claims, and filed a copy of this levy with the recorder of Cochise county, Territory of Arizona.

Dated Sept. 13th, 1890.

S. T. CARR, *Constable.*

TERRITORY OF ARIZONA, }
County of Cochise, } ss:

I, W. F. Bradley, county recorder in and for the county of Cochise, do hereby certify that the above and foregoing is a full, true, and correct copy of a writ of attachment, A. Cohn, plaintiff, *vs.* A. J. Mehan, defendant, as appears on file now in my office.

In witness whereof I have hereunto set my hand and affixed my official seal, at my office, in Tombstone, this 27th day of May, A. D. 1892.

W. F. BRADLEY,
County Recorder.

RECORDER'S OFFICE, TOMBSTONE,
COCHISE COUNTY, A. T.

Filed at request of S. T. Carr, September 13th, A. D. 1890, at 11.15 a. m.

W. F. BRADLEY,
County Recorder.

Endorsed: No. 1614. Copy. Title of court and cause. Writ of attachment issued the 13th day of September, 1890. C. G. Johnson, J. P. Received this summons on the 13th day of Sep-
71 tember, 1890, at 10 o'clock a. m. S. T. Carr, constable. Filed May 27th, 1892. A. H. Emanuel, clerk.

By Mr. REILLY: We object to the officer's return on this paper on the ground that it is void for want of description.

By the COURT: It may go in now and the objection may be argued on the hearing.

By Mr. BARNES: I now offer in evidence the execution in the same case and the certificate of filing, October 6, 1890; also the other paper, endorsed "Certificate of sale of real estate on execution in case of Cohn *vs.* Mehan," and also the certificate on the back, showing it to have been filed Oct. 30, 1890, all of which are as follows, viz:

EXHIBIT "M."

In the Justice's Court of Precinct No. One, County of Cochise, Territory of Arizona, before Chas. G. Johnson, a Justice of Peace.

The Territory of Arizona to the sheriff or any constable of Cochise county, Greeting:

Whereas a judgment was rendered before me, a justice of the peace of precinct No. one, in said county of Cochise, on the 29th day of September, A. D. 1890, against A. J. Mehan and in favor of A. Cohn, for the sum of two hundred and ninety-nine dollars, damages, and twelve and $\frac{55}{100}$ dollars, cost of suit:

These are, therefore, to command you that you levy and cause

to be made, by distress and sale, as the law directs, the
72 said amount of two hundred and ninety-nine dollars and — dollars, costs of suit, together with the costs that may accrue, and of this writ make legal service and due return within sixty days from the date hereof.

Given under my hand, at my office, in said precinct No. one, this 29th day of September, 1890.

CHAS. G. JOHNSON,
Justice of the Peace.

TERRITORY OF ARIZONA, } ss:
County of Cochise, }

I, S. T. Carr, constable, hereby certify that by virtue of the foregoing execution I levied upon the following property, to wit, mining claims in Warren mining district, Cochise county, Territory of Arizona, known and located as "George Washington," "Old Republican," "Copper Frying Pan," "Intervenor," "Angel," "Irish Mag," "Copper Monarch," "Old Canteen," and "Diadem" mining claims, on the 29th day of September, 1890.

S. T. CARR, *Constable.*

Dated September 29th, 1890.

TERRITORY OF ARIZONA, } ss:
County of Cochise, }

I, W. F. Bradley, county recorder in and for the county of
73 Cochise, do hereby certify that the above and foregoing is a full, true, and correct copy of an execution, A. Cohn, plaintiff, *vs.* A. J. Mehan, defendant, as appears on file now in my office.

In witness whereof I have hereunto set my hand and affixed my official seal, at my office, in Tombstone, this 27th day of May, A. D. 1892.

W. F. BRADLEY, [SEAL.]
County Recorder.

RECORDER'S OFFICE,
TOMBSTONE, COCHISE COUNTY, A. T.

Filed at request of S. T. Carr, Oct. 6th, A. D. 1890, at 3 p. m.

W. F. BRADLEY,
County Recorder.

Endorsed: No. 1614. Title of court and cause. Execution. Filed May 27th, 1892. A. H. Emanuel, clerk.

Certificate of Sale.

TERRITORY OF ARIZONA, } ss:
County of Cochise, }

Before C. G. Johnston, J. P., precinct No. one.

A. COHN, Plaintiff, *vs.* A. J. MEHAN, Defendant. } Judgment Rendered on the 29th Day of September, 1890.

I, S. T. Carr, constable of the precinct, county, and Territory aforesaid, do hereby certify that by virtue of an execution in the above cause, attested the 29th day of September, 1890, by
74 which I was commanded to make the amount of three hundred and eleven and $\frac{55}{100}$ dollars to satisfy the judgment in this action, with interest thereon and costs, out of the personal property of the above defendant, and if sufficient personal property could not be found, then out of the real property belonging to the said defendant on the 13th day of September, 1890, or at any time thereafter, as by the said writ, reference being thereunto had, more fully appears, I have levied upon and this day sold at public auction, according to the statute in such cases made and provided, to A. Cohn, who was the highest bidder, for the sum of three hundred and forty-nine and $\frac{55}{100}$ dollars, which was the whole price paid by him for the same, the real estate described as follows, to wit: Being mining claims in Warren mining district, county of Cochise, Territory of Arizona, known and located as the George Washington, Old Republican, Copper Frying Pan, Angel, Irish Mag, Copper Monarch, Intervenor, Old Canteen, and Diadem mining claims, more particular description of which appears in the records of the recorder's office of the county of Cochise, Arizona, and that the said real estate is subject to redemption in six months, pursuant to the statute in such cases made and provided.

Given under my hand this 27th day of October, 1890.

S. T. CARR, *Constable.*

75 TERRITORY OF ARIZONA, } ss:
County of Cochise, }

I, W. F. Bradley, county recorder in and for the county of Cochise, do hereby certify that the above and foregoing is a full, true, and correct copy of a certificate of sale, A. Cohn *vs.* A. J. Mehan, as appears now on file in my office.

In witness whereof I have hereunto set my hand and affixed my official seal, at my office, in Tombstone, this 27th day of May, 1892.

[SEAL.]

W. F. BRADLEY,
County Recorder.

Endorsed: No. 1614. Title of court and cause. Certificate of sale of real estate on execution. Filed and recorded at request of

S. T. Carr, October 30th, A. D. 1890, at 11 a. m. W. F. Bradley, county recorder, by C. A. Buddington, deputy. Filed May 27th, 1892. A. H. Emanuel, clerk.

By Mr. REILLY: The writ of attachment is objected to because it does not refer to any record. We also object to the certificate of sale, because it does not contain any description by which the property can be identified.

By Mr. BARNES: I now offer in evidence the justice's docket and the papers in the case of A. Cohn *vs.* A. J. Mehan, before Mr. Johnson, justice of the peace.

76 CHARLES GRANVILLE JOHNSON, a witness called and sworn on behalf of plaintiff, testified as follows:

Direct examination.

By Mr. BARNES:

Q. What office do you hold?
A. Justice of the peace.
Q. What office did you hold Sept. 13, 1890, and for a year before and a year after that?
A. Justice of the peace of precinct No. 1, Cochise county.
Q. (Exhibiting book.) What book is that?
A. My docket.
Q. As justice of the peace?
A. Yes, sir.

By Mr. BARNES: Now, I offer the entry on page 137 of this docket, being the docket of the justice of the peace for precinct No. 1, township 1, Cochise county, Arizona; C. G. Johnson, J. P.; A. Cohn, plaintiff, *vs.* A. J. Mehan, defendant; action for debt; demand, $299.00; Wm. C. Staehle, att'y for pl't'ff; A. R. English, att'y for defendant.

1890, Sept. 13.—Complaint and affidavit filed; case docketed; affidavit for attachment filed; undertaking on attachment approved and filed; writ of attachment issued and copy of same; summons issued; also copy of same, and defendant personally served; and same returned and filed.

Sept. 27.—Defendant appears by A. R. English, his attorney, and pleads the general denial and demands bill of particulars.

77 "29.—Now comes plaintiff's attorney and asks for judgment upon the ground that the statute requires a written demand for bill of particulars, and case set for hearing and argument Sept. 29th, 1890, at 2 o'clock p. m., and files three notes sued upon. Two p. m., case called, plaintiff appearing by himself and by his attorney, Wm. C. Staehle, Esq., and no one on behalf of defendant; plaintiff sworn on his own behalf; cause submitted, and, after due consideration of the law and the evidence, it is ordered, adjudged, and decreed that the plaintiff have judgment, as prayed for in his complaint, viz., for the sum of two hundred and ninety-nine dollars, together with his costs of suit, amounting to the sum of twelve

and $\frac{55}{100}$ —, and that plaintiff have execution therefor. C. G. Johnson, J. P. Justice's fees, $6.75; constable's do., $5.80.

1890, Sept. 29.—Execution issued on demand of plaintiff, $1.25.

Oct. 27.—Affidavit of publication taken and filed, also affidavit of posting notices, and execution returned satisfied (except costs).

Here is what was filed in the case—simply the amount due on three promissory notes, wa-ving any accruing sum beyond the $299. Here is the writ of attachment, with endorsements of levy on the same, and affidavit of posting notices. Here is the summons,
78 issued Sept. 23, 1890, served by delivering the defendant a true copy.

The writ of attachment and levy is just like the ones I read, which were copies of these.

And here is notice of appeal by A. R. English, attorney of defendant, Oct. 4, 1890. Here, too, is the execution and return. Here is the affidavit for attachment and bond on attachment, and here are the notes sued on. We offer all these papers in evidence, and upon this we rest our case. They are as follows, viz:

"N."

Title of Court and Cause.

The Territory of Arizona send- a greeting to A. J. Mehan, defendant:

You are hereby summoned and required to appear in an action brought against you by the above-named plaintiff in the said justice's court, before said justice of the peace, at his office, Fremont street, city of Tombstone, Cochise county aforesaid, and to answer the said complaint filed therein within five days (exclusive of the day of service) after the service on you of this summons, if served within this precinct, or if served without this precinct, but in this county, within ten days, or if served out of this county within fifteen days, otherwise within twenty days, or judgment by default will be taken against you according to the prayer of said complaint. The said action is brought to recover two hundred and ninety-nine
79 dollars, United States gold coin, and you are hereby notified that if you fail to appear and answer the said complaint, as above required, the plaintiff will apply for judgment by default against you for said sum and all costs.

Given under my hand, at my office, this 13th day of Sept., A. D. 1890.

CHAS. G. JOHNSON,
Justice of the Peace in and for said Precinct, County, and T.

TERRITORY OF ARIZONA, } ss:
County of Cochise, }

I hereby certify and return that I executed the within summons on the 23rd day of September, 1890, by delivering to the within-named defendant in person a true copy of this summons.

S. T. CARR, *Constable.*

Endorsed: Title of court and cause. Summons. Received for service this 13th Sept., 1890, at 10 o'clock a. m. S. T. Carr, constable. Returned and filed Sept. 23rd, 1890, at one o'clock p. m. Chas. G. Johnson, justice of the peace. Filed Feb. 8th, 1893. A. H. Emanuel, clerk.

Complaint.

TOMBSTONE, ARIZONA, *Sept. 1st*, 1890.

Mr. A. J. Mehan.

80 A. Cohn, Dr.

To amount due on three promissory notes (the holder waiving any accruing sum thereon) beyond $299.00... $299.00

$54.75. TOMBSTONE, *January* 29, 1886.

One day after date, without grace, I promise to pay to the order of A. Cohen fifty-four $\frac{75}{100}$ dollars, for value received, with interest at one per cent. per month from date until paid, both principal and interest payable only in United States gold coin.

A. J. MEHAN.

$30.00. TOMBSTONE, *January 29th*, 1886.

One day after date, without grace, I promise to pay to the order of A. Cohn thirty dollars, for value received, with interest at one per cent. per month from date until paid, both interest and principal payable only in United States gold coin.

A. J. MEHAN.

$204.75. TOMBSTONE, *April 11th*, 1887.

One day after date, without grace, I promise to pay to the order of A. Cohn two hundred and four $\frac{75}{100}$ dollars, for value re-
81 ceived, with interest at — per cent. per — from — until paid, both principal and interest payable only in United States gold coin.

A. J. MEHAN.

Endorsed: Title of court and cause. Before C. G. Johnson, J. P. Complaint. Filed Sept. 13th, 1890. C. G. Johnson, J. P. Filed Feb. 8th, 1893. A. H. Emanuel, clerk.

Affidavit for Attachment.

Title of Court and Cause.

TERRITORY OF ARIZONA, } ss.:
County of Cochise, }

A. Cohn, being first duly sworn, says that he is the plaintiff in the above-entitled cause; that said defendant, A. J. Mehan, is justly indebted to said plaintiff over and above all set-offs and counter-claims in the sum of two hundred and ninety-nine ($299) dollars, and that the defendant is not a resident of this Territory; that said

claim is due, unpaid, and unsecured; that this attachment is not sued out for the purpose of injuring or harassing the defendant, and the plaintiff will probably lose his debt unless an attachment is issued.

A. COHN.

Subscribed and sworn to this 13th day of Sept., 1890.

W. C. STAEHLE,
Notary Public. [SEAL.]

82 Endorsed: Title court and cause. Affidavit for attachment. Filed this 13th day of Sept., 1890. Chas. G. Johnson, justice of the peace. No. 1614. Filed Feb. 8th, 1893. A. H. Emanuel, clerk.

Bond on Attachment.

TERRITORY OF ARIZONA, } ss:
County of Cochise, }

We, the undersigned, A. Cohn, as principal, and J. B. Miano and Emil Sydow, as sureties, acknowledged ourselves bound to pay to A. J. Mehan the sum of five hundred and ninety-eight ($598.00) dollars; conditioned that the above-bounden A. Cohn, plaintiff in attachment against the said A. J. Mehan, defendant, will prosecute his said suit to effect, and that he will pay all such damages and costs as shall be adjudged against him for wrongfully suing out such attachment.

Witness our hands this 13th day of September, 1890.

A. COHN.
JOHN B. MIANO.
EMIL SYDOW.

Affidavit of sureties attached.

Subscribed and sworn to this 13th day of September, 1890.

W. C. STAEHLE,
Notary Public. [SEAL.]

83 Endorsed: Title of court and cause. Bond on attachment. Approved and filed this 13th day of September, 1890. Chas. G. Johnson, justice of the peace. No. 1614. Filed Feb. 8th, 1893. A. H. Emanuel, clerk.

Affidavit of Posting Notice of Constable's Sale.

TERRITORY OF ARIZONA, } ss:
County of Cochise, }

Before C. G. Johnson, J. P., precinct No. one.

S. T. Carr, of Tombstone, Arizona, being duly sworn, deposes and says that he is constable, duly qualified and acting as such in the county of Cochise, Arizona; that he posted three notices, of which the attached noticie is a copy, on the 2nd day of October, 1890—one

at the door of the court-house in said county, one at the post-office in the city of Tombstone, and one at the office of W. C. Staehle, on Allen street, same city; and further saith not.

A. T. CARR.

Subscribed and sworn to before me this 27th day of October, 1890.

W. C. STAEHLE,
Notary Public. [SEAL.]

Endorsed: Title of court and cause. Aff. of posting notices. Filed Oct. 27th, 1890. C. G. Johnson, J. P. Filed Feb. 8th, 1893. A. H. Emanuel, clerk.

84 *Notice of Constable Sale.*

By virtue of an execution issued out of Justice C. G. Johnson's court of No. one precinct, county of Cochise, Territory of Arizona, dated the 29th day of September, 1890, in a certain action wherein A. Cohn, as plaintiff, recovered judgment against A. J. Mehan for the sum of two hundred and nine- nine and twelve and $\frac{55}{100}$ dollars, costs of suit, on the 29th day of September, 1890—

I have levied upon the following-described property, to wit: Being mining claims in Warren mining district, Cochise county, Territory of Arizona, known and located as the "George Washington," "Old Republican," "Copper Frying Pan," "Angel," "Irish Mag," "Copper Monarch," "Intervenor," "Old Canteen," and "Diadem" mining claims; more particular description — which appears in the records of the recorder's office of Cochise county.

Notice is hereby given that on Monday, the 27th day of October, 1890, at one o'clock p. m. of that day, in front of the court-house in the city of Tombstone, county of Cochise, Arizona, I will sell all the right, title, and interest of the said defendant, A. J. Mehan, in and to the above-described property at a public auction, for cash in United States currency, to the highest and best bidder, to satisfy said execution and all costs. Dated at Tombstone the 2nd day of October, 1890.

S. T. CARR, *Constable.*

85 By Mr. ENGLISH: We desire to show that the notes sued on in this case *was* barred by the statute of limitations.

By the COURT: That may be a matter of defence, but it is not matter that goes to the jurisdiction.

By Mr. BARNES: In that connection, the record shows that the defendant was there and did not plead it.

By Mr. REILLY: In addition to the other objections to the attachment that it does not describe the property, I now move on this docket to strike out the attachment altogether on the ground that it was issued without authority of law. The justice's docket shows that the writ of attachment was issued before the summons, and there is no authority in the justice's court to issue a writ of attachment before summons issued.

Objection overruled. Exception by defendant.

By Mr. ENGLISH: Another objection is that the docket does not show that attachment was issued against the defendant, and does not show any continuance of the case from the 27th to the 29th, the latter being the day on which judgment was rendered. There is no evidence that the defendant ever appeared in the justice court after the 27th.

The whole objection is that it is immaterial and does not show the jurisdiction of the court, does not show any judgment against the defendant. *and does not show any judgment against the de-*
86 *fendant*, and does not show the issuance of execution.

By the COURT: It will go in subject to the objection, and the objection may be argued with the case.

By Mr. REILLY: We now offer in evidence the judgment-roll in the case numbered 1534 in this court, being the case of Angela Diaz de Daley *vs.* James Daley, as follows, viz:

Title of Court and Cause No. 1534.

Judgment and Decree by the Court, May 4th, 1891.

This cause coming on to be heard this 14th day of May, 1891, upon the complaint herein taken as confessed by the defendant, whose default for not answering had been duly entered by the clerk of this court, and upon the proofs submitted to the court on the part of plaintiff, from which it appears to the satisfaction of this — that all the material allegations of the said complaint are sustained by testimony free from legal exceptions as to its competency, admissibility, and sufficiency, and it also appearing to said court that said defendant was duly served with the summons, and all and singular the law and the premises being by the court here understood and fully considered—

Wherefore it is here ordered, adjudged, and decreed, and this — does order, adjudge, and decree, that the marriage between the said plaintiff, Angela Dias de Daily, and the said defendant,
87 James Daily, be dissolved, and the same is hereby dissolved, and the said parties are and each of them is freed and absolutely released from the bonds of matrimony heretofore existing between the said plaintiff and the said defendant and from all the obligations thereof.

And it is further ordered, adjudged, and decreed that the plaintiff is the equitable owner of all the interest, right, and title in and to the following-described mines and mining claims, the legal title to which was at the commencement of this action and prior thereto in the defendant, and that she recover the same, to wit:

The "George Washington," located January 1st, 1887; recorded in Book 11, Records of Mines, at page 225.

The "Old Republic," located December 15th, 1888; recorded in Book 9, Record of Mines, at pages 84 and 85.

The "Copper Frying Pan," located January 22nd, 1889; recorded in Book 11, Records of Mines, at page 628.

The "Angel" mine, located January 1st, 1887; recorded in Book 11, Records of Mines, at page 225.

The "Old Canteen," located January 1st, 1889; recorded in Book 9, Records of Mines, at pages 89 and 90.

The "Diadem mine," located January 24th, 1888; recorded in Book 11, Records of Mines, at page 613.

The "Intervenor mine," located December 21st, 1888; recorded in Book 11, Records of Mines, at page 613.

88 The "Irish Mag" mine, located January 1st, 1886; recorded in Book 11, Records of Mines, at page 104.

The "Copper Monarch" mine, located July 28th, 1888; recorded in Book 11, Records of Mines, at page 555, in the office of the county recorder of this county of Cochise, all situate in the Warren mining district, in the county of Cochise, Territory of Arizona, with the improvements thereon and the appurtenances thereto in anywise belonging; all which property is worth about three thousand dollars.

And it is further ordered and decreed that the said plaintiff may resume her former name of Angela Dias.

Done in open court this 14th day of May, 1891.

RICHARD E. SLOAN, *Judge.*

By Mr. BARNES: We object to it because it does not bind us; we were not parties to it.

By Mr. REILLY: We offer it only so far as it is binding on the whole world. We admit it is not conclusive evidence on the question of property. We introduce it for the purpose of showing that the defendant here was the wife of James Daley, and that a decree of divorce was granted by this court in that case, and that her name is now Angela Diaz.

(Objection renewed.)

Objection overruled. Exception by plaintiff.

By Mr. REILLY: We now introduce the judgment-roll in
89 the case of Angela Diaz de Daley *vs.* James Daley, Andrew J. Mehan, *et al.*, case No. 1535, in this court:

Title of Court and Cause No. 1535.

Judgment by the Court, May 26th, 1892.

This cause came on regularly for trial on this 26th day of May, 1892, James Reilly, Esq., appearing as counsel for plaintiff, and Allen R. English, Esq., who heretofore appeared as counsel for the defendants Andrew J. Mehan and Dewitt C. Turner, have, at the November term of this court, 1891, withdrawn from the case, and the default of the defendant James Daley having been duly entered by the clerk of this court, and the said defendants, Mehan and Turner, having failed to appear, either in person or by counsel, at this term of court, and it appearing to the satisfaction of the court that each and every of said defendants have been duly served with summons in this action and failed to appear at this term of court:

This cause was tried before the court without a jury; whereupon

plaintiff introduced her evidence, oral and documentary, and the evidence being closed, the cause was submitted to the court for consideration and decision, and after due deliberation thereon the court finds that each and every of the allegations in plaintiff's complaint contained are true and sustained by competent evidence, free from all objections as to its sufficiency, materiality, and relevancy.

90 Wherefore it is ordered, adjudged, and decreed that the plaintiff, whose name is now Angela Dias, is the owner of the following-described mines and mining claims and interests in mining claims situate in Warren mining district, county of Cochise, Territory of Arizona, to wit, the "George Washington," located January 1st, 1887, and recorded in Book 11 of Records of Mines, at page 225; the "Old Republican," located December 15th, 1888, and recorded in Book 9 of Records of Mines, at pages 84 and 85; the "Copper Frying Pan," located January 22nd, 1889, and recorded in Book 11 of Records of Mines, at page 628; the "Angel," located January 1st, 1887, and recorded in Book 11 of Records of Mines, at page 225; the undivided half of the "Irish Mag," located January 1st, 1886, and recorded in Book 11 of Records of Mines, at page 104; and an undivided third interest in each of the following-named mining claims, to wit, the "Copper Monarch," located July the 28th, 1888, and recorded in Book 11 of Records of Mines, at page 555; the "Intervenor," located December 24th, 1888, and recorded in Book 11 of Records of Mines, at page 613; the "Old Canteen," located January the 1st, 1889, and recorded in Book 9 of Records of Mines, at pages 89 and 90; the "Diadem," located January 24th, 1888, and recorded in Book 11, Records of Mines, at page 613, all of said records being in the office of the county recorder of the said county of Cochise.

91 And that defendants have not nor has either or any of them any right, title, or interest in or to said mines or mining claims or interests in mining claims nor in any or either of them, and that the deed made by the defendant James Daley to the defendant Andrew J. Mehan, dated September 2nd, 1890, and recorded in Book 11 of Deeds of Mines, at page 225, and the deed made by the defendant Andrew J. Mehan to the defendant Dewitt C. Turner on the 15th day of September, 1890, and recorded in Book 11 of Deeds of Mines, at page 228, all in the office of the county recorder of the aforesaid county of Cochise, be, and the same are hereby, cancelled of record as a cloud on plaintiff's title to said property.

And if further appearing to the satisfaction of this court that plaintiff caused to be filed and recorded in the office of the county recorder of the county of Cochise aforesaid, after this action was commenced, to wit, on the 18th day of October, 1890, a notice of the pendency of this action in all respects as required by statute, it is further adjudged and decreed that the title of said plaintiff to all of said property be qui-ted as against said defendant-, James Daley, Andrew J. Mehan, and De Witt C. Turner, and all persons claiming

from or under them or either of them by title subsequent to the filing and recording of said notice.

Dated May 26th, 1892.

By order of the court:

92 RICHARD E. SLOAN, *Judge.*

By Mr. BARNES: We were not parties to that suit, could not be heard in it, and are not bound in any way by the judgment in that case.

By the COURT: Before it could be material to this inquiry you must show that this plaintiff had either actual or constructive notice of the pendency of the action.

By Mr. REILLY: In that suit we offer notice of *lis pendens* filed with the county recorder Oct. 18, 1890, Book 1, *Lis Pendens*, pages 143, 144, affecting the same mining claims.

By Mr. BARNES: We admit that is Mr. Bradley's signature on the back of it, and that he is the recorder of Cochise county, and *and* that this document is in his possession as such county recorder, but we object to it for the reasons before stated.

By the COURT: Let it go in subject to the objection.

It is as follows, viz:

EXH. "O," LIS PENDENS.

Title of Court and Cause.

Notice of Pendency of Action.

Notice is hereby given that an action has been commenced in the above-entitled court by the above-named plaintiff against the above-named defendants to set aside deeds and remove clouds on title and to quiet the title of plaintiff to the premises and real estate in
93 the complaint in said action and hereinafter described, and to determine all and every claim of the defendants or either or any of them adverse to plaintiff, and that the premises affected by said suit are situated in the Warren mining district, county of Cochise, Territory of Arizona, and described as follows, to wit:

The "George Washington" mine, located January 1st, 1887, and recorded in Book 11, Records of Mines, page 225; the "Old Republic" mine, located December 15th, 1888, and recorded in Book 9, Records of Mines, pages 84 and 85; the "Copper Frying Pan" mine, located January 22nd, 1889, and recorded in Book 11, Records of Mines, page 628; the "Angel" mine, located January 1st, 1887, and recorded in Book 11, Record of Mines, at page 225; an undivided one-half interest in the "Irish Mag" mine, located January 1st, 1886, and recorded in Book 11, Records of Mines, page 104; an undivided one-third interest in the "Copper Monarch" mine, located July 28th, 1888, and recorded in Book 11, Records of Mines, page 555; an undivided one-third interest in the "Intervenor" mine, located December 24th, 1888, and recorded in Book 11, Records of Mines, page 613; an undivided one-third interest in the

"Old Canteen" mine, located January 1st, 1889, and recorded in Book 9, Records of Mines, pages 89 and 90; an undivided one-third interest in the "Diadem" mine, located January 24th, 1888, and recorded in Book 11, page 613.

All of which records hereinbefore referred to are in the office of the county recorder of the county of Cochise, Territory of
94 Arizona.

Dated October, 1890.

JAMES REILLY,
Att'y for Pl'ff.

TERRITORY OF ARIZONA, }
County of Cochise, } *ss:*

I, A. Wentworth, county recorder in and for the county of Cochise, do hereby certify that the above and foregoing is a full, true, and correct copy of a *lis pendens*, Daley *vs.* Daley, Mehan, & Turner, as appears of record now in my office, in Book 1, page- 143, 144.

In witness whereof I have hereunto set my hand and affixed my official seal, at my office, in Tombstone, this 11th day of February, A. D. 1893.

[SEAL.]

A. WENTWORTH,
County Recorder.

RECORDER'S OFFICE, TOMBSTONE, COCHISE CO., A. T.

Filed and recorded, at request of James Reilly, October 18th, A. D. 1890, at 9.25 a. m., Book 1, *Lis Pendens*, page- 143, 144.

W. F. BRADLEY,
County Recorder.

Filed Feb. 11th, 1893.

A. H. EMANUEL, *Clerk.*

By Mr. REILLY: We now offer the deposition of Andrew J. Mehan, filed in this cause.

By Mr. BARNES: We object to the materiality of questions
95 and answers numbered 6, 7, 8, 9, 10, and 11 in this deposition, on the ground that it is an attempt to vary a deed by parol and an attempt to create an express trust by parol.

By the COURT: Read the deposition and I will consider the objection.

(Deposition read) and is hereto attached and marked Exh. "Z."

By Mr. BARNES: There is a further objection to the 8th question and answer, as stating what James Daley told the witnesses; therefore it is heresay.

EXH. "Z."

Interrogatories.

To be answered by Andrew J. Mehan, as a witness in the case of Adolph Cohn *vs.* Andrew J. Mehan, Dewitt C. Turner, Bell H. Chandler, F. C. Fisher, and Angela Dias de Daley, No. 1614, in district court, Cochise county, Arizona.

1st interrogatory. State your name and age.

2nd Inter. Are you a defendant in this action?

3rd Inter. Do you know your codefendants or any of them? And if you do, state which and how many of them you do know.

4th Inter. Do you know one James Daley, a former resi-
96 dent of Bisbee, Arizona?

5th Inter. Where were you on the 2nd day of September, 1890?

6th Inter. If, in answer to the last question, you say that on the 2nd day of September, 1890, you were in Pueblo, State of Colorado, then state whether or no you saw the said James Daley then or there; also state whether or no you saw then and there your codefendants Turner, Chandler, and Fisher, or either of them.

7th Inter. If, in answer to the last question, you state that you saw said James Daley at Pueblo, State of Colorado, on or about September 2nd, 1890, then state fully what, if any, transactions you had with him then and there, and whether or no any of your codefendants were present at such transactions; if so, which of them.

8th Inter. If, in answer to the last question, you say that said Daily on or about September 2nd, 1890, conveyed to you any property, state what property, where situated, what you did with the deed, whether or no you had it recorded, and, if so, where and what consideration, if any, you paid for that property, and state the whole transaction and conversations had between yourself and Daley about that property at that time.

97 9th Inter. If, in answer to the 7th question, you say that said Daley conveyed to you any mines c. interests in mines, then state whether or no you afterwards conveyed the same mines or any interests therein to any other person; and, if so, state when and to whom you made the first conveyance and what consideration, if any, was paid therefor.

10th Inter. If, in answer to the last question, you say that you conveyed an interest in certain or any mines to your codefendant Dewitt C. Turner, then state whether said Turner at or prior to said conveyance knew the nature of the transactions between yourself and the aforesaid James Daley concerning said mines or interests in said mines, either or both, and if he did, state how he knew it, who told him, and whether you were present at the time.

11th Inter. State now all the conversations, as nearly as you can, had, if any, with said Turner about certain mines known as the Daley mines, situate near Bisbee, Arizona, prior to the 15th day of

September, 1890, and in particular what, if anything, you told him about the title and ownership of said Daley mine.

JAMES REILLY,
Attorney for Angela Dias de Daley, Defendant.

98 No cross-interrogatories were filed.

A. H. EMANUEL, *Clerk.*

Endorsed: No. 1614. Deposition of A. J. Mehan. Opened by Judge Barnes May 23rd, 1892. I received the within package from the hands of J. B. Collier, notary public, this 4th day of Feb., 1892. Ella G. Timversy, P. M. Received from P. O., Tombstone, Feb. 10th, 1892. A. H. Emanuel, clerk. Filed Feb. 10th, 1892. A. H. Emanuel, clerk.

EXH. "Z."

Title of Court and Cause.

Deposition of A. J. Mehan.

TERRITORY OF NEW MEXICO, } ss:
County of Lincoln, }

Be it remembered that pursuant to the commission hereto annexed and on the 4th day of February, A. D. 1892, at White Oaks, in the county of Lincoln, Territory of New Mexico, before me, J. B. Collier, a notary public in and for said county, personally came ANDREW J. MEHAN, personally known to me, who, being by me first duly sworn, was then and there examined by me on the interrogatories hereto and to said commission annexed, and answered said interrogatories as follows, to wit:

99 To the 1st Inter. he saith: My name is Andrew J. Mehan. My age is 38 years.

To the 2nd Inter. he saith: I am.

To the 3rd Inter. he saith: I know them all, Turner, Chandler, Fisher, and Mrs. Daley.

To the 4th Inter. he saith: I do.

To the 5th Inter. he saith: Was in Pueblo, State of Colorado, on the 2nd day of September, 1890.

To the 6th Inter. he saith: I saw James Daley then and there. I did not on that day see any of the other defendants.

To the 7th Inter. he saith: On that day, September the 12th, 1890, the said James Daley made a deed to me of mines and interests of mines situate in Warren mining district, Cochise county, Arizona. None of my codefendants were present.

To the 8th Inter. he saith: The property conveyed by that deed consisted of the George Washington mine, the Old Republican, the Copper Frying Pan, the Angel, a half interest in the Irish Mag, a one-third interest in Copper Monarch, situate — Warren mining district, Cochise county, Arizona, and some others. I had the deed recorded in the office of the recorder of Cochise county, Arizona. I

paid no consideration for that property. I promised to take
100 care of the property for his wife, and make a sale of the property and satisfy Mrs. Daley after paying my own expenses. Mr. Daley said it was his wife's money that made the property.

To the 9th Inter. he saith: I afterwards conveyed a half interest in these mines to Dewitt C. Turner, the defendant, on or about the 15th day of September, 1890. He paid nothing for that deed.

To the 10th Inter. he saith: At the date of that deed said defendant, Turner, knew the nature of the transactions between myself and the said James Daley about said mines. I told him myself.

To the 11th Inter. he saith: I told him all the conversations between myself and Daley about the Daley mines; that Daley said the mines were good; that — wanted his wife protected; and I told him all the instructions given me by Daley and all the promises I made to him.

ANDREW J. MEHAN.

Subscribed and sworn to before me this 4th day of February, A. D. 1892.

[SEAL.]

J. B. COLLIER,
Notary Public.

101 TERRITORY OF NEW MEXICO, } ss:
County of Lincoln, }

I, J. B. Collier, notary public in and for said county, do hereby certify that Andrew J. Mehan, the witness named in the commission hereto annexed, came before me on the 4th day of February, at White Oaks, Lincoln county, New Mexico, and was by me first duly sworn to make truthful answers to the interrogatories hereto annexed, and thereupon made answer to said interrogatories as set down in the foregoing deposition, containing three pages, exclusive of this one, which answers were by me reduced to writing, and when completed *was* by me carefully read over to him, and, being by him corrected, were by him subscribed and sworn to in my presence.

In witness whereof I have hereunto set my hand and seal of office this 4th day of February, A. D. 1892.

J. B. COLLIER,
Notary Public.

[SEAL.]

Notary fees, $5.00.

102 JAMES REILLY, a witness called and sworn on behalf of defendant, testified as follows:

Direct examination.

By Mr. ENGLISH:

By the WITNESS: I know Andrew J. Mehan. I have known him about eleven years. I cannot for a certainty tell where he is now. I am satisfied he is not in this Territory. I got a letter from

him four days ago, from El Paso. He wrote me some four or five times in the last six months from New Mexico (interrupted)——

Objected to as not the best evidence. Objection sustained.

Q. You heard from him at El Paso, Texas, did you?

Objected to because the writing is the best evidence.

A. I will state now that I know he was in El Paso four or five days ago.

By Mr. BARNES:

Q. Did you see him there?
A. No, sir. I got letters and telegrams from him.

By Mr. BARNES: Then we object to any testimony that is not of your own knowledge unless you produce it.
By the COURT: Yes; produce them.

By Mr. ENGLISH (resuming):

Q. How long has it been since Andrew J. Mehan was seen in the county of Cochise, to your knowledge?
103 A. One year and nine months.
Q. Have you ever heard that he was in the county since that time?

Objected to as immaterial. Objection sustained.

A. I have not.
Q. You say you received a letter from him in El Paso four days ago?
A. Six or seven; I don't remember which.
Q. Please produce the letters you have received.
A. I don't keep those letters usually, but I will produce one of them.

By the COURT: Well, produce the letters, Mr. Reilly.
By the WITNESS: I don't know as I can produce more than one. I will have to hunt considerable, but I think *it* will find them.

(Witness retired from the stand, and returned after an absence of about ten minutes.)
This is the letter before the last that I got from Mehan (producing a letter). We offer the date of the letter and the envelope and the signature of Mehan to show where he is.

By Mr. BARNES: We object to it.

Q. In whose handwriting do the words "A. J. Mehan" on the outside of the envelope appear, if you know?

Objected to.

A. I am well acquainted with the handwriting of Andrew J. Mehan; this is his signature; this letter is in his writing.
Q. Where did you receive this?

104 A. I received it at Tombstone some days after the postmark there.

By Mr. REILLY: I offer in evidence this envelope, with the handwriting of A. J. Mehan on the outside and the postmark "El Paso, Texas, May 16, 1892," and the card "Return to Center Block hotel, El Paso, Texas," and addressed "James Reilly, Esq., Tombstone, Arizona," and on the back of it appears the Tombstone post-office mark, May 17, 1892.

Objected to.

By Mr. BARNES:

Q. What came inside of it?

A. A letter which I have in my hand.

By Mr. BARNES: I object to the offer of the envelope alone, because, in the first place, it does not prove anything. It is mere hearsay. All of it might have been done right here in this town. The postmarks are not evidence of anything.

By the COURT: It may go in, subject to the objection.

By Mr. ENGLISH: We also offer in evidence the letter which came in the envelope, dated El Paso, Texas, May 16, 1892, signed by Andrew J. Mehan. We do not offer the body of the letter—the private correspondence.

By Mr. BARNES:

Q. Was there another letter enclosed in this envelope?

A. No, sir.

By Mr. BARNES: I will read this letter to the court.

By the COURT: I do not care to hear the contents of it. It is not material.

105 By the WITNESS: This is not the last letter I got from him. I got one on the 22nd or 23rd. The last time I saw him, I saw him in New Mexico, about three months ago.

By Mr. BARNES:

Q. I will ask you if you know whether this man Mehan has any interest in the result of this suit.

A. Not to my knowledge.

Q. Do you know whether or not he has a contract, deed, or paper-writing of some kind by which this woman agrees to give him part of this property if it is recovered?

A. Not to my knowledge.

Q. You never heard of such a thing?

A. Never heard of such a thing.

Q. From him or from her?

A. Never heard of such a thing from her or him.

By Mr. ENGLISH: We now offer in evidence a subpœna issued in this case for Andrew J. Mehan and which bears the return that the sheriff made due inquiry and that the within-named party is not

in the Territory. Signed C. B. Kelton, sheriff. The date of the subpœna is today—May 27th, 1892.

Objected to as immaterial and incompetent.

By Mr. ENGLISH: It was issued today and returned today. We now offer the deposition of said Andrew J. Mehan already read.

106 (At this point Joseph Madero was sworn as interpreter of the Spanish language for witnesses who could not speak English.)

ANGELA DIAZ, the defendant, called and sworn in her own behalf, testified (through the interpreter) as follows:

Direct examination.

By Mr. REILLY:

Q. What is your name?
A. Angela Diaz.
Q. What was your name over a year ago?
A. Angela Diaz de Daley.
Q. Are you the same person who procured a divorce in this court a year ago from James Daley?
A. Yes, sir.
Q. And are you a defendant in this action?
A. Yes, sir.
Q. Were you a party plaintiff in an action in this court yesterday in the case of Angela Diaz *vs.* James Daley, Mehan, and Turner?

By Mr. BARNES: Oh, there is no question about her being the same party.

Q. When did you marry James Daley?
A. I don't recollect.
Q. How long since, do you know?
A. At this date it would be seven years.
Q. How long did you live together, you and he?
A. A little over five years.
Q. When did you separate?
A. The 11th day of April.
Q. What April—how many years ago?
A. Two years ago.

107 Q. When you married Mr. Daley did you have any money or property?

Objected to as immaterial. Objection overruled.

A. I had money.
Q. How much?
A. Three thousand dollars.

By Mr. BARNES: We make the same objection to all this testimony.

Q. Did Mr. Daley have any money?

Objected to as immaterial.

A. No, sir.
Q. Did Mr. Daley earn any money during the five years that you were husband and wife?

By Mr. BARNES: That is objected to as immaterial.
We do not care for a ruling now, as it is being heard by the court, and there is no jury here.

A. No, sir.
Q. What became of that three thousand dollars that you had?

Objected to as immaterial.

A. Mr. Daley spent it in prospecting and working the mines, and for the maintenance of both of us.
Q. What mines; do you recollect the names of those mines?

Objected to as immaterial.

A. I recollect some of the names; not all.
Q. Give some of them that you recollect.
108 A. Irish Mag, Washington, Republican, Angel, Copper Pan; I don't recollect the names of the others.
Q. Were there others?
A. I think so.
Q. Were not the Copper Monarch and the Diadem and Old Canteen in these?

Objected to as leading. Objection sustained.

Q. Do you know of any other mines?
A. I don't recollect the names.
Q. Who located these mines?
A. Mr. Daley.
Q. Who was with him?
A. I was.
Q. Who built the monuments?
A. Him and myself.
Q. Did you know, during that five years, that the title to those mining claims was in the name of James Daley?

Objected to as immaterial.

A. No, sir; I did not.
Q. In whose name did you suppose they were?

Objected to as immaterial.

A. In my name.
Q. Why did you suppose that?

Objected to as immaterial.

A. Because they were prospected with my money.
Q. Did Mr. Daley tell you anything about it?

Objected to. Objection overruled.
Exception by plaintiff.

A. He told me they were in my name.

109 Q. Could you read English—call it American—language?

A. No, sir.

Q. Do you understand anything about the laws or the language of this country?

Objected to as immaterial.

By the COURT: I do not think that material. Ignorance of the law is not proper to be considered; ignorance of the fact may be shown.

Q. Did you ever sell or convey any of the right to these mines to anybody?

A. I have not sold or conveyed anything.

Q. When did you first know that the title to these mines were in the name of Daley?

Objected to as immaterial.

A. The first intimation I had was when the man Andy Mehan came to me and told me that he had the documents.

Q. When was that, whether after or before your separation from Daley?

A. That was when Daley was gone.

Q. Do you know how long after Daley was gone?

A. Five or six months.

Q. Was all of that $3,000 of yours used in working these mines?

Objected to as leading. Objection sustained.

Q. What has become of that $3,000 of yours?

Objected to as repetition.

A. Spent in prospecting and working the mines and for our maintenance.

110 Q. These mines you have mentioned?

Objected to as leading.

Q. What mines?

A. In the Irish Mag.

Q. Any others?

A. Angel.

Q. Any others?

A. Washington.

Q. Others?

A. Republican.

Q. Others?

A. Copper Pan.

Q. What was the last?

A. In Spanish it is called Copper Pan.

Q. Well, any others?

A. I think there are two more, but I don't know the names.

Q. Did Daley work any other mines except those that he worked with your money?

Objected to as leading.

By the COURT: Yes; avoid leading questions.

Q. Do you know the year in which you married Daley—do you know what year this is?

Objected to as immaterial. Objection sustained.

Q. Do you know the year in which you married Daley?

A. I don't remember.

Q. Who did the work on these mines?

Objected to because it assumes there was work done. Objection overruled.

A. I paid for the work, and Mr. Daley was just managing.

The answer is objected to as a legal conclusion.

Q. Who were the persons that did the work?

111 A. Sometimes Americans and sometimes Mexicans.

Q. What money paid them?

Objected to as immaterial.

A. My money.

Q. Were you married before you married James Daley?

A. Yes, sir.

Q. Was your husband alive or dead when you married Daley?

A. He was dead.

Q. Where did he die?

A. In Hermosillo.

Q. That was before you were married to Mr. Daley?

A. Yes, sir.

Q. That is all.

Cross-examination.

By Mr. BARNES:

Q. You say you don't know what year you married Daley in?

A. No, sir.

Q. Where did you marry him?

A. In Bisbee.

Q. Who was present?

A. I do not recollect who was present.

Q. Was anybody present?

A. Nobody.

Q. Do you say nobody was present at all?

Objected to as immaterial.

By the COURT: The record of the divorce is conclusive as fixing the status of the parties. Proceed.

Q. In what house in Bisbee were you married?

A. In a house that I was renting. Daley had no house.

Q. Did Daley come to your house to be married?

A. Yes, sir.

112 Q. Did he come alone?
A. Yes, sir.
Q. What had Daley been doing before that? What had been his business before this time he came to your house and was married to you?

Objected to as immaterial. Objection overruled. Exception.

A. He was doing nothing.
Q. How long had you known him before you married him?

Objected to as immaterial.
By Mr. BARNES: We propose to show the claims were located before the marriage.
By the COURT: Proceed, then.
Exception by defendant.

A. About three months.
Q. Where was he living those three months?
A. In Bisbee.
Q. And what was he doing?
A. I don't know what he was doing.
Q. Wasn't he prospecting out in the mountains?
A. I don't know.
Q. After you married, did you go to live anywhere else?
A. In a little ranch where I am living now.
Q. Where is that ranch?
A. In Washington.
Q. How far from Bisbee?
A. About a mile.
Q. How long after you married Daley did you go to live at this place?
A. About the same time we went there to build up the
113 little ranch; it was vacant.
Q. Which one of the mines you have mentioned was located first?

Objected to as not cross-examination and as immaterial Objection overruled.

Q. Now, which one of the mines you have mentioned was located first?
A. Washington; where we built the ranch.
Q. Were you there present when the Washington mine was located?
A. Yes, sir.
Q. Was this ranch built on the Washington claim?
A. Yes, sir.
Q. How long had you been married when you located this Washington claim?
A. I don't recall the time.
Q. Two or three months, you say?
A. I don't remember.
Q. Well, you say right away after you were married you moved down to this ranch?

A. Yes, sir; to the land.

Q. And did you make the location when you went down there after you were married, first?

Objected to as putting words in the mouth of the witness which she had not uttered. Objection overruled.

Q. Did you make the location of the Washington claim before you went down to that ranch, or after you went down to that ranch?

A. Before.

Q. How long was it after you were married before you located this Washington claim?

A. I don't recollect the time.

Q. How long after you were married did you move down
114 on that claim?

A. I don't recollect.

Q. How long did you and James Daley live in your house in Bisbee after you were married, altogether?

A. I don't recollect the date.

Q. You are certain you hadn't known him but three months before you married him, are you?

A. Yes, sir.

Q. No more than that?

A. No.

Q. Do you mean by that that you knew him no longer than that?

A. That's all.

Q. Now, can't you tell how many days or weeks you lived with James Daley in your own house in Bisbee after you married him and before you went down to the house on the Washington location?

A. No, sir; I don't recollect.

Q. Did you live with him two weeks there before you went to Washington?

A. I don't recollect.

Q. Did you live with him two months before you went down to Washington?

A. I don't recollect.

Q. Did you live with him two years before you went down there?

A. I don't recollect; I don't know the date.

Q. Did not you swear a few minutes ago that you moved down to the ranch shortly after you were married?

A. Yes, sir; but I don't recollect the time, nor the date.

Q. I am not asking for the time or the date, but I am asking how many days or weeks you lived with James Daley in the house in Bisbee before you moved down to Washington.

115 A. I don't recollect the time, whether a week or two weeks, or more.

Q. Give your best recollection.

A. I can't say, because I don't know.

Q. Can't you tell whether you lived there a year or not with James Daley in Bisbee before you went down to Washington?

A. I can't say, because I don't know.

Q. Why did you say that shortly after you were married you moved down to Washington?

A. I did say so, but I don't recollect the time or the date.

Q. I do not ask you for the date. I ask you how long after you were married you lived in Bisbee before you went to Washington.

A. I don't recollect anything.

Q. It wasn't very long anyway, was it?

A. I don't recollect whether a long or a short time.

Q. What was the next mine located after the Washington?

Objected to as going too far on cross-examination.

By the COURT: They have a right to test her knowledge or her memory to the fullest extent.

A. The Irish Mag.

Q. You are sure that was located after the Washington was located?

A. Yes, sir.

Q. Who was present when the Irish Mag was located?

A. I don't recollect the name, but it was Charlie.

116 Q. Charlie Altschul?

A. He is not here now.

Q. Was he working there with your husband?

A. No; was a sort of friend, that is all.

Q. Wasn't he located in the Irish Mag with Daley?

A. He was just a friend of Daley's, but I don't think he was in the location.

Q. Were you there when the monuments were put up on the Irish Mag?

A. Yes, sir.

Q. You were his wife at that time?

A. Yes, sir.

Q. Where were you and Daley lodging and eating your meals at that time?

A. At the ranch; we had a small house there.

Q. On the Washington claim?

A. —, sir.

Q. You are living there yet?

A. Yes, sir.

Q. You lived in that house on that claim all the time you were married to Daley after you moved down there from Bisbee?

A. Yes, sir.

Q. And where did you get your provisions?

A. From the company.

Q. Whose money paid for them?

A. Mine.

Q. Your money furnished all the provisions for the family during those five years, did it not?

A. Yes, sir—clothes and everything.

Q. Clothes for both of you?

A. Yes, sir.

Q. And all provisions?

A. Yes, sir.

Q. And during that time you and he were living together as husband and wife?

A. Yes, sir.

117 Q. Did you have any servant to cook for you or did you do the cooking yourself?

A. Him and I; no more.

Q. You did your own cooking there yourself?

A. Yes, sir; we did all the work.

Q. And during that time he was at work on the mines there?

A. Till the time would come to do the work.

Q. He didn't do anything? What we call assessment-work, did he do that?

A. All he did was to manage and superintend the people that I had working.

Q. How much work did he do? Did he work those mines all the time?

A. Yes, sir.

Q. Worked them all the time?

A. Yes.

Q. Take out any ore?

A. Yes; he used to take out ore; it was left there with the mines.

Q. Was any shipped off and any money got for the ore?

A. No, sir.

Q. Never sold any ore at all?

A. No, sir.

Q. During all those five years did Daley work anywhere else?

A. No, sir.

Q. Didn't work for wages for anybody?

A. No, sir.

Q. Stayed there and lived off you all that time?

A. Yes, sir.

Q. How much money did you have left when he went away?

A. About $400.

Q. All you had left when he went away was that?

A. Yes, sir.

118 Recess 12 to 1.30 o'clock.

Q. About how old are you?

A. 35 years; maybe a little more; I don't recollect.

Q. You say you never have conveyed any of these mining claims to anybody?

A. No, sir.

Q. Didn't you make a deed to Mr. Tribolet and give it to Mr. Tribolet for some of these claims?

A. No, sir.

Q. Do you know Mr. Tribolet?

A. I know this, that if Mr. Tribolet would do the work on some of these mines, then I would deed the mines to him.

Q. Did you sign any deed?

A. I signed a paper, but I don't know what kind of a paper it was.

Q. What did you mean by saying, in answer to Mr. Reilly, that you never had conveyed these mining claims to anybody?

A. All I wanted to say was that I didn't deed anything to anybody.

Q. Do you say that now?

A. Yes, sir; I haven't deeded anything.

Q. Did you give a deed to Tribolet?

A. I signed a paper because Mr. Tribolet wanted to do the work on this mine.

Q. Did you give this paper to Mr. Tribolet?

A. He made those papers himself.

Q. Did you sign them?

A. I signed it, but I don't know what kind of a paper it is.

Q. Why? Why do you swear you never conveyed this property if you don't know what what paper was?

119 Objected to because the paper referred to is not produced.

By the COURT: Of course, before there is evidence of conveyance, the conveyance itself must be produced. There is no evidence now that there was any conveyance.

Q. Why do you swear you never conveyed the mining claims, if you don't know what it was you did sign?

A. I have not deeded the mines.

Q. What was your business before you married Daley?

Objected to as immaterial and not cross-examination. Objection sustained.

Q. Before you married Daley were you not a prostitute?

Objected to. Objection sustained. Exception by plaintiff.

Q. How long had you had this $3,000 when you married Daley?

A. I was left a widow.

Q. How long was it you were a widow?

A. Two years.

Q. Where did you keep this money during that time?

A. In my house.

Q. What kind of money was it?

A. Paper, silver, and gold.

Q. How much of it was gold?

A. I don't know.

Q. How much of it was paper?

A. Altogether it was $3,000.

Q. How much of this money was paper?

Objected to as immaterial.

120 A. Probably a little over $2,000 was paper.

Q. How much of it was silver?

A. The rest of the money was in silver.

Q. How much of it was in silver?

A. I don't recollect exactly how much paper there was or how much silver.

Q. How much, to your best recollection, was silver? I don't ask you to state exactly.

Objected to as repetition.

A. I don't recollect.

Q. Was there as much as $100 in silver?

A. I think there was more.

Q. Was there as much as $200 in silver?

A. I don't know about that.

Q. What did you have the money in, a box or a sack, or what kind of a thing did you have it in?

A. In a sack, and a part of it I had in a little box.

Q. What kind of a sack was it?

A. Canvas sack.

Q. How long?

A. About so high (illustrating about a foot long, B. W. T.) and so wide (making a small circle of 4 or 5 inches in diameter with the fingers).

Q. You had the silver in that sack?

A. Gold and silver both.

Q. Did you have any paper money in that sack?

A. No, sir.

Q. Where did you keep the money?

A. In a small box.

Q. What kind of a box was that?

A. A wooden box.

121 Q. How large a box?

A. A little larger than a cigar box.

Q. Did it have a lock on it and key?

A. Yes, sir.

Q. Where did you keep this box?

A. In *a* my trunk.

Q. And where did you keep the gold and *i* silver?

A. In the trunk also.

Q. Did Daley know you had this money when he married you?

A. No, sir.

Q. You never had told him so?

A. No, sir.

Q. How long after you married him did he find out you had this money?

A. About a year, more or less.

Q. Did he find out you had the money before you moved down to the Washington claim or after?

A. When we moved down to Washington then was the time I told him I had this money so we could do some kind of business with it.

Q. How long had you been down to Washington before you told him you had the money?

Objected to as an assemption. Objection overruled.

Q. How long after you moved down to Washington was it that you told Daley you had this money?

A. When we were in Bisbee he told me he wanted to build a house and that he didn't have any money, and then was the time I told him I had the money.

Q. How long was that after you were married?

A. I think a little over a year.

Q. Did you live in Bisbee a year after you were married, before you moved down to Washington?

A. I think so.

122 Q. Did not you swear this morning that you moved down to Washington very soon after you were married?

A. Yes, sir; a little after.

Q. That was true, wasn't it?

A. I don't think a year is very long.

Q. Did you get any other money while you were living with Daley besides this $3,000?

A. No, sir.

Q. You say you bought your provisions from the company's store at Bisbee?

A. Yes.

Q. Did you buy the provisions in the store at Bisbee all the time you lived with Daley?

A. From the store and from some of the fruit stands around there—wherever I could get it.

Q. When was the company store is Bisbee started?

A. I don't recollect

Q. How far is this house you lived in on the Washington claim from Bisbee?

A. I don't know. I think a little less than a mile.

Q. Do you mean to be understood or do you say you put up monuments on all the mines you have named?

A. Mr. Daley and myself.

Q. He helped you, then, did he?

A. We had a tapeline and were measuring.

Q. You would hold one end of the tapeline and he the other?

A. Yes, sir.

Q. And did you help Daley make all these monuments on all those claims you have mentioned?

123 A. Yes, sir.

A. Yes, sir.

Q. How many monuments did you put on the Washington claim?

Objected to as immaterial.

A. I don't recollect.

Q. How many monuments did you help put on the Washington claim?

A. I don't recollect very well, but I think it was four.

Q. How many monuments did you put on the Copper Frying Pan claim?

A. I don't recollect.
Q. How many monuments did you help put on the Old Republican claim?
A. I don't know. I don't recollect.
Q. How much work was done on the Old Republican claim while you lived with Daley?

Objected to as not cross-examination. Objection overruled. Exception by defendant.

A. I don't know how much work was done there. The men we put to work and Daley managed it and paid with my money.

By Mr. BARNES: I move to strike out the latter part of that answer as not responsive.
Motion denied.

Q. How much work was done on the Copper Frying Pan claim while you lived with Daley?
A. I have said that I don't know (interrupted)——
Q. How much work was done on the Old Republican claim while you lived with Daley?
124 A. And paid for with my money?
Q. I did not ask for that, and I ask to have it excluded.

By the COURT: Yes; I think it should be.

Q. How much work was done on the Irish Mag claim while you lived with Daley?
A. I don't know. The work was done every year.
Q. What work was done every year?
A. All I know, ten feet and $100.
Q. Was that all that was done each year?
A. Yes.

Redirect examination:

Q. Have you got the location notices of these mines now?
A. Yes, sir.
Q. How long have you had them?
A. Ever since they were located.
Q. Where are these official notices now?
A. In my trunk.
Q. In this town or in Bisbee?
A. In Bisbee.
Q. Can you from your house without any help go onto the Irish Mag?

Objected to as immaterial. Objection sustained.

Q. You said this morning in your cross-examination that when you and Daley located the Irish Mag you were living on the George Washington. Is that a mistake?

Objected to. Objection sustained. Exception by defendant.

Q. Do you recollect now where you were living at the time you located the Irish Mag?

125 Objected to as not proper re-examination. Objection overruled.

Q. Do you recollect now where you and Daley lived at the time you located the Irish Mag mine?

Objected to as leading. Objection overruled. Exception by plaintiff.

A. We were living in a house at Bisbee.

Recross-examination:

Q. Where were these location notices when Daley ran away from Bisbee?

Objected to as containing an assumption.

Q. Did not Daley run away from Bisbee on account of killing Lowther?

Objected to as improper. Objection sustained.

Q. Did you hear of Lowther being killed by somebody?

Objected to as immaterial.

By Mr. BARNES: I want to show that he ran away at that time. I also want to show that the deed was made while Daley was a refugee in Colorado.

Objection sustained. Exception by plaintiff.

Q. Where were those location notices when Daley left Bisbee?

A. With me.

Q. How long had they been with you before that?

A. All the time, ever since they were located.

126 Q. Where are they now?

A. In my trunk.

Q. Where is your trunk?

A. In Bisbee.

Q. Why didn't you bring them up with you?

A. I didn't know whether they were needed.

Q. You say you have got all of these location notices now?

A. Yes.

Q. And you have had them ever since the locations were made?

A. Yes, sir.

Q. Never been out of your possession at all since the locations were made?

A. No, sir.

Q. Now, have you talked with anybody since the court adjourned, at noon, about where you were living when the Irish Mag was located?

A. No, sir.

Q. Did you have a talk with Judge Reilly during the intermission while court adjourned today?

A. No, sir.

Q. Did you have a talk with anybody during the time the court adjourned, at noon?

Objected to as immaterial.

A. No, sir.

Q. Did anybody say anything to you about whether the Irish Mag was located before the Washington claim or not, during the noon intermission?

A. No.

Q. Did not you swear before noon today that the Washington claim was located before the Irish Mag was?

127 A. I said that we had located the Washington, but I didn't say anything about the others.

Q. Didn't you swear you located the Washington first, and before the Irish Mag was located?

A. I don't know.

Q. Now, do you say the Irish Mag was located first?

A. There is too many questions; I can't answer to them.

Q. Do you say now that the Irish Mag was located before the Washington?

A. They ask me the same question so many times that I can't answer it.

Q. That is the best answer you can make now, is it?

A. I can't say any more.

Q. Which was located first, the Old Republican or the Copper Frying Pan?

A. I don't know.

Q. Which was located first, the Irish Mag or the Copper Frying Pan claim?

A. I don't recollect.

Q. How far was the Irish Mag from the Washington?

A. I don't know; I can't tell.

Q. What direction was it from the Washington?

A. I don't know.

Q. How far was the Old Republican from the Washington claim?

A. Right opposite: in front.

Q. Adjoining; did they touch each other?

A. The Washington is here (indicating), and the Republican is right in front.

Q. Which was located first, the Washington or Republican?

128 A. I don't know.

Q. How far was the Republican from the Irish Mag?

A. I can't say.

Q. How far was the Copper Frying Pan from the Republican?

A. I don't know.

Q. How far was the Copper Frying Pan from the Irish Mag?

A. I don't know.

Q. Which was located first, the Copper Frying Pan or the Irish Mag?

A. I don't know; I don't recollect.

By Mr. REILLY:

Q. Do you know in what direction Bisbee lies from your house?
A. I don't know—down.
Q. That will do.

ROBERT P. STEVENS, a witness called and sworn on behalf of the defendant, testified as follows:

Direct examination.

By Mr. REILLY:

Q. Where do you reside?
A. Bisbee, Cochise county, Arizona.
Q. How long have you resided there?
A. About 11 years.
Q. Did you know James Daley there?
A. I did.
Q. Did you know the defendant Angela Diaz?
A. Yes, sir.
Q. Did you know her before *t* she married Daley?
A. Yes, sir.
Q. Can you tell how long it is since the time of that marriage?
A. Well, I can't tell for sure, but it certainly is as much
129 as seven years. I am inclined to think it is a little longer, but I am not sure of that fact; it was none of my business, particularly, and I didn't take much notice.
Q. Did Daley have any money, to your knowledge, at that time or did he earn any afterwards?

Objected to as immaterial and leading.
By the COURT: Yes; it does not appear that he knows.

Q. Did you know Daley well?
A. Yes, sir; I knew him well.
Q. Did you know whether he had money or not?

Objected to as immaterial. Objection overruled. Exception by plaintiff.

Q. Did he have any money?
A. Not to my knowledge.
Q. Do you know if Angela Diaz had money at that —?
A. I could not swear positive if she did, but I think she did.

By Mr. BARNES: We object to what this witness thinks about it, and we object to the last question and answer.
By the COURT: Yes; I think that is incompetent.

Q. Did you see anything with Mrs. Daley to satisfy you that she had money?

Objected to as improper. Objection sustained.

Q. What makes you think that she had money?

Objected to as not calling for a fact.
By the COURT: If he knows any facts he may state them.

130 Q. State what facts you know that led you to believe she had money.

A. Well, I hardly know how to get at it; one thing, I saw a good-size canvas sack marked "$1,000."

Objected to.

Q. That is all.

Cross-examination.

By Mr. BARNES:

Q. Do you know what was in the sack?

A. I do not. There was nothing in it when I seen it.

Q. Were you present when Daley was married to this woman?

A. No, sir; I was present the evening before when they had a talk.

Q. Did you testify yesterday that you were present when they were married?

A. No, sir.

Q. Then you were not present when they were married?

A. I was not.

Q. How do you fix the time?

A. Well, I did it from other circumstances.

Q. Well, not, just tell us how you figure out the time to be 7 years and not eight years or six years.

A. Well, I couldn't do that positively; the other things I remember in my business and one way and another.

Q. Now, might not it be that they have been married eight years?

A. I don't think so.

Q. Mightn't it be that they have been married only six years?

131 A. They have been married over six years.

Q. You are sure of that?

A. Yes, sir.

Q. Do you remember what time in the year they were married?

A. No; not for sure.

Q. Can't tell what month?

A. Cannot.

Q. Can't tell whether spring, summer, fall, or winter?

A. Well, sir, I am not sure of it, but it appears to me it was in the fall of the year.

Q. How do you know that they were married at all?

A. Well, I know they lived together.

Q. Oh, is not that all you know about it?

A. That's all.

Q. Where were they living? Where did they first go to live together?

A. In what is called "Mexican town" in Bisbee.

Q. How long did they live there?

A. Only a very short time.

Q. How long do you mean by that?

A. A week or two or two or three weeks, or something of that kind.

Q. Where did they go then?

A. Down the canyon a short distance.

Q. Do you know where the Washington claim is?

A. Yes, sir.

Q. Did they go to live on that claim?

A. Not then; no.

Q. How far from the Washington claim did they live?

A. Something near half way between Bisbee and Washington.

Q. How long did they live there?

A. That I don't know. Some little time, but no great time.

132 Q. They only lived about a week in Bisbee?

A. It might have been two or three weeks, or might have been even more.

Q. Put your outside limit.

A. It was none of my business, and (interrupted)——

Q. It is your business not to tell your best recollection about it.

A. But any man that has any business at all (interrupted)——

Q. Then if you don't know anything about it, why do you say anything about it?

A. I say it because I was asked.

Q. Tell us what your answer is, then.

A. You asked me how long they lived there, and I told you they lived there some considerable time.

Q. Now put your outside limit. You said about a week.

A. I didn't say a week.

Q. Well, I won't quarrel with you about that. How long did they live there before they moved down the canyon?

A. I could not say.

Q. A year?

A. No, sir.

Q. A month?

A. Yes, sir.

Q. Two months?

A. I couldn't say.

Q. Three months?

A. I couldn't say.

Q. Could you say four months?

A. No; they only lived there a short time.

Q. How long do you mean by saying "a short time"?

133 A. In some instances I might mean six months.

Q. I mean in this instance. How long do you mean by "a short time"?

A. I couldn't remember to tell you sure about it.

Q. Do you know anything about it?

A. I do; I know they only lived there a short time.

Q. How long is that?

A. I would not say; I ain't going to tell you a thing I don't know.

Q. What idea do you wish to convey by "a short time"?

A. It might have been from one week to two months.
Q. Two months the outside?
A. I think so.

Redirect examination:

Q. How long did they live together from that time?
A. About five years.
Q. Up to the time he went away?
A. Yes, sir.
Q. Did they treat each other as husband and wife during that time?
A. Yes, sir.

Recross examination:

Q. When did he go away?
A. I think, to the best of my recollection, it was two years last April.
Q. Do you remember what time in April?
A. It was on the 11th day of April, if I remember right.
Q. How long before Daley went away was Lowther killed?

Objected to as immaterial and not cross-examination.

A. That is only hearsay; I didn't see Daley go away, but
134 I never saw him after that day, and I don't think I saw him on that day,
Q. How long was it after the death of Lowther that you missed Daley?
A. I missed him immediately after, and I never saw him after.
Q. Never saw him since?
A. No.
Q. That is all.

Defendant rests.

FRANK BROAD, a witness called and sworn by the plaintiff in rebuttal, testified as follows:

Direct examination:

By Mr. BARNES:

Q. Mr. Broad, do you know this man A. J. Mehan?
A. Yes, sir.
Q. Where did you know him?
A. I knew him in Tombstone?
Q. How long did you know him in Tombstone?
A. About 11 years, or 12 years, maybe.
Q. Do you know what his general reputation is in this community or in the community where he lived for truth and veracity?

By the COURT: Answer yes or no.

Q. Do you know what his general reputation is?

A. Yes, sir; I do.
Q. Is it good or bad?
A. Well, it is pretty bad, I think.
Q. Did you have any conversation with him?
A. I did, sir.
Q. Here in Tombstone?
135 A. Well, a number of us had a conversation together; not me alone.
Q. Wait a minute till I fix the time. After the second day of September, 1890, did you see him here in Tombstone?
A. I did, sir.
Q. More than once?
A. I met him two or three times.
Q. Did you have any conversation with him while he was here?
A. I did.
Q. Did you have any conversation with him about who owned the Daley mines?
A. Well, I heard a conversation that there was some money to be paid a party on the strength of owning the mines.
Q. What did he say about owning them?

Objected to as immaterial.

By the COURT: Is this sought to be introduced as an admission or a contradiction?

By Mr. BARNES: As a contradiction of this deposition by his declaration.

By the COURT: It cannot be introduced as an admission to bind this defendant. It can go to his credit and veracity as a witness. The only question is whether a foundation such as would be necessary if the witness was upon the stand has been laid. (After argument:) I will sustain the objection.

Exception by plaintiff.

Q. I will ask you if, in a conversation with Mr. Mehan since the making of that deed here in Tombstone, he did not say to
136 you that he owned this property and was going to get capital and work these mines?

Objected to as before. Objection sustained. Exception by plaintiff.

By Mr. BARNES: I have other witnesses to the same effect, but under the ruling of the court I will not call them. That is all.

Cross-examination.

By Mr. REILLY:

Q. I understand you to say that Mr. Mehan's reputation for truth and veracity is pretty bad?
A. I am not speaking for killing or beating, but for things I know—borrowing saddles and things like that.
Q. Wait a moment. Who in Tombstone did you hear speaking about his general reputation for veracity and truth?

A. Poor old Mr. Carr—he is dead now—spoke about a saddle he borrowed a day to go to Bisbee, and he had to pay the charges and $100 expenses, I believe, for himself and son going two or three trips.

Q. He didn't bring it back, do you mean?

A. Yes, sir; and he didn't send a letter to that effect, either.

Q. Well, who else?

A. Mr. Harry Dreker spoke a number of times that he wasn't square.

Q. Wasn't it more that he didn't pay his debts that you heard?

A. That is it.

137 Q. Isn't that all you ever heard about Andy Mehan—that he didn't pay his debts?

A. You can hear plenty.

Q. Did you ever hear anything more than that?

A. I heard Mr. Carr say, as I told you before, that he borrowed a saddle and didn't return it, and he sent word to Mr. Mehan to bring it back, and he left it at Bisbee, and I went one trip after it myself and he went one, and he sent his son, too.

Q. Now, wasn't the purport of Harry Dreker's remarks as to whether he didn't pay?

A. He didn't pay.

Q. But what was the purport of Dreker's talk about Mr. Mehan?

A. Harry Dreker could tell it himself probably as well as I could if he was here.

Q. But I want you to tell it.

A. I was present when he borrowed money, I think, or spoke about some money in regards to some of these mines—that he owned the mines in Bisbee.

Q. Is that all?

A. That is all I know about that case.

Q. Who else did you hear talking about him?

A. I could tell you if I could remember the names. I have said all I know about it. In regard to Jim Daley—you will remember Mr. Daley was a friend of mine until (interrupted)——

Q. I did not ask you about that at all. Wasn't all of the conversation you had with people about Andy Mehan to the effect that he borrowed and didn't pay his debts?

A. The conversation we had I believe there was four or

138 five others present, and another time I remember Mr. Carr, our dead constable, spoke about loaning him a saddle and he didn't return it, and he done him a dirty trick, and put him to more expense than three saddles cost him; that was poor old man Carr.

ANGELA DIAZ, defendant, recalled for plaintiff in rebuttal, testified as follows:

Direct examination.

By Mr. BARNES:

Q. Were you a witness before the coroner's inquest in relation to Lowther's death, at Bisbee?
A. No, sir.
Q. (Exhibiting a document.) Did you write that name?
A. That is not my handwriting.
Q. Do you swear you did not sign that?
A. That is not my handwriting.
Q. Do you swear you did not write that "Angela Diaz"?
A. I don't know.

Objected to as not cross-examination.

Q. Did not you swear as a witness on that coroner's inquest, in the presence of S. C. Perrin, that you were not the wife of James Daley?

Objected to.

By Mr. BARNES: It is for the purpose of testing her veracity.
139 By the COURT: You cannot contradict her upon an immaterial point.
By Mr. BARNES: I want to show that she swore upon that inquest that she was not James Daley's wife, but that she lived with him five years as housekeeper. It is to impeach the witness.
By the COURT: It cannot be material, except as to the marriage, and the status of the parties was fixed by the divorce.
(Exception by plaintiff.)

J. F. DUNCAN, a witness called and sworn on behalf of the aforesaid plaintiff in rebuttal, testified as follows:

Direct examination.

By Mr. BARNES:

Q. Do you know A. J. Mehan?
A. Yes, sir.
Q. Where did you know him?
A. I knew him in Tombstone, and in Bisbee also.
Q. How long have you known him?
A. I think it must be about in the neighborhood of 10 or 11 years.
Q. Do you know his general reputation in the communities where he has lived for truth and veracity?
A. I know that from general reputation; yes.
Q. Do you know the general reputation of Andrew J.
140 Mehan in the communities where he has lived for truth and veracity?
A. Yes, sir.

Q. Is it good or bad?
A. Bad.
Q. That's all.

Cross-examination.

By Mr. REILLY:

Q. Where did you know him?
A. In Bisbee and also in Tombstone.
Q. When did you know him in Bisbee?
A. Along about 1882.
Q. How long was he there in 1882?
A. I couldn't altogether say, but I think he was there about six months.
Q. Where did you know him again?
A. I knew him in this town.
Q. How long have you lived in this town with him here?
A. I have not lived in this town with him here. I have been here on business and seen him here and talked to him here.
Q. Then you never lived in the town when he was here?
A. No, sir; only to stop over a night or day.
Q. Did you know him at Bisbee at any other time except 1882?
A. I did not, except as he came in and back.
Q. Who did you ever hear speak of his reputation for truth and veracity?
A. Various ones.
Q. Who?
A. I can't mention names, it is so long past.
Q. Can't mention anybody?
A. No, sir.
Q. That is the impression you formed about him—that his reputation was bad for truth and veracity, in Bisbee, this six
141 months ten years ago now?
A. Yes, sir.
Q. You haven't lived in Bisbee the last 4 or 5 years, have you?
A. I have lived in Bisbee all but two years now.
Q. You haven't lived in Bisbee for two years?
A. No.
Q. You never lived in Bisbee when Andy Mehan was there?
A. What?
Q. I mean you never have lived in Tombstone when Andy Mehan was there?
A. Only when he come here in regard to these mines.
Q. That was two years ago?
A. A year and a half ago.
Q. You never did live in Tombstone when Andy Mehan lived here?
A. Only when he was here then.
Q. When he was here on a visit?
A. I don't know whether he was on a visit or not.
Q. Been away from this camp six or seven years?

A. No; I don't think that long.
Q. Since 1886?
A. That I don't know.
Q. Well, about that length of time?
A. I suppose maybe about that length of time, but I wouldn't be positive.
Q. You never did live in a town in which he lived except here for six months and that was ten years ago in Bisbee?
A. Yes, sir; ten years ago in Bisbee.

By Mr. BARNES:

Q. How general is your acquaintance with people in Tombstone?
A. I am acquainted very generally over the town.
142 Q. And have been for many years?
A. Yes, sir; very.

Further cross-examination.

Q. Is it not a fact that you do not know many people here?
A. No, sir; I know a great many.
Q. When did you first speak about this case to Mr. Cohn?
A. Today.
Q. Did he come to you to see if you would swear Mehan's reputation was bad?
A. No, sir.
Q. What did he say?
A. In regard to other matters.
Q. Did he speak to you about this case today?
A. No, sir; I spoke to him.
Q. Did you tell him you knew Andy Mehan's reputation?
A. No, sir; I did not.
Q. How did he happen to put you on the stand as a witness?
A. I don't know.
Q. Did you speak to Judge Barnes about it?
A. Only out in the vestibule. Mr. Barnes asked me what his reputation was and I told him I considered it bad.
Q. Who did you ever hear say it was bad?
A. Plenty of people.
Q. Who?
A. I don't know; I can't remember just now, it is so long ago.
Q. Ten years ago?
A. No.
Q. How long ago?
A. Maybe 7 or 8 years ago.
Q. That's all.

143 S. TRIBOLET, a witness called and sworn on behalf of plaintiff in rebuttal, testified as follows:

Direct examination.

By Mr. BARNES:

Q. Do you know this man A. J. Mehan?
A. Yes, sir.
Q. How long have you known him?
A. Ever since 1880.
Q. Where have you known him?
A. Known him here in Tombstone.
Q. Where have you been living since 1880?
A. Russellville and Bisbee.
Q. And you have known him in those places?
A. Yes, sir.
Q. Do you know what his general reputation has been for truth and veracity where he has lived?
A. Yes, sir.
Q. Has it been good or bad?
A. Bad.

Cross-examination.

By Mr. ENGLISH:

Q. Who have you ever heard speak about his reputation as bad?
A. Lots of them.

By Mr. BARNES:

Q. Do you know anything about a deed made by this woman of these mining claims?
A. Yes, sir.

By Mr. REILLY: That is objected to unless the deed is here.

Q. Do you know anything about such a deed?
A. Yes, sir.
Q. Where is it?
A. I sent it back to Bisbee. My brother has got it.
144 Q. There was such a deed?
A. Yes, sir.
Q. And you had it?
A. Yes, sir.

Cross-examination resumed:

Q. Your brother Robert procured a deed from this woman here, Mrs. Diaz, conveying these mines to your brother under power of attorney, didn't he?
A. That's what he did.
Q. He procured it under an agreement that he made with her at

the time that he was to put up counsel fees and costs and carry on this litigation; that was the reason of the giving of the deed?

A. Yes, sir.

Q. He did not do that?

A. Well, you know why he didn't.

Q. He didn't do it?

A. No.

Q. The consideration failed?

A. Yes, sir.

Q. And these deeds remained in Mr. Swain's possession and remain in his possession today, as agent of this lady, don't they?

A. I don't think so.

By Mr. BARNES:

Q. Why wasn't the agreement carried out?

Objected to as immaterial.

Further cross-examination:

Q. Who did you hear speak of the reputation of Mr. Mehan being bad for truth and veracity?

A. Different men that did business with him.

145 Q. That was as far as being good or bad was concerned, wasn't it?

A. Yes, sir; and knocking a fellow down if you asked him for it.

Q. That did not prove that he was a liar or perjurer, did it?

A. A man of hard temper, to a great extent; yes, sir.

Q. Why did you answer counsel here and say that you knew his reputation to be bad for truth and veracity? In other words, you knew he would lie?

A. Yes, sir; he would lie.

Q. Did you know his reputation to be such?

A. Yes, sir.

Q. Who did you hear say so?

A. My own experience.

Q. That don't create his general reputation. Who did you hear say so?

A. Mr. Warnekros.

Q. What did he say about him?

A. He said that he was no good.

Q. When did he say so?

A. I couldn't tell the time exactly.

Q. How long ago?

A. Years ago.

Q. Said he was no good?

A. Yes, sir.

Q. Is that all that he said about him?

A. That he was a bad man to have dealings with.

Q. Was that all?

A. Why, he may have spoken other things about the man, but to that effect.

Q. Was that all he said about him—to that effect?
A. Yes, sir.
Q. Who else did you hear speak of him?
A. A man named Harry Dreker that worked for him.
Q. Barkeeper for Martin Costello?
A. Yes, sir.
146 Q. What did he say about him?
A. Said he couldn't get his pay from him for his work that he done for him as barkeeper over in Russellville.
Q. Is that all he said about him?
A. Said he was a "bad egg."
Q. Is that all?
A. Called him some bad names.
Q. Exhibited a great deal of feeling against him, did he?
A. Yes, sir.
Q. Who else did you hear speak of him?
A. I can't remember now. I know some drummers from San Francisco.
Q. That he owed a bill to?
A. Yes, sir.
Q. And they couldn't collect their bill?
A. Yes, sir.
Q. And they called him names because they couldn't collect their bills?
A. Yes, sir.
Q. Is that all they said about him relating to not paying his bills?
A. They may have said more, but I can't remember.
Q. Do you know of any one that you have heard speak of him and his reputation?
A. Well, I couldn't remember anybody else.
Q. You have told all that you remember about it, have you?
A. Well, I said more about my own dealings that I had with the man.
Q. You formed your impression from the man from your own personal dealings with him?
A. Mostly so.
Q. And not from what you heard from other persons?
A. No more than what I have stated.
147 Q. That is all.

ADOLPH COHN, called and sworn in behalf of the plaintiff in rebuttal, testified as follows:

Direct examination.

By Mr. BARNES:

Q. You are the plaintiff in this suit?
A. Yes, sir.
Q. Did you know Andy Mehan?
A. I did.

Q. How long have you lived in Tombstone?
A. I have known him, I presume, ten or eleven years here.
Q. Where have you been living during that time?
A. In this town.
Q. Engaged in business?
A. Merchandising.
Q. Keeping a cigar store?
A. Yes, sir.
Q. Is the place where you keep your cigar store a public place?
A. Yes, sir.
Q. Do you know the general reputation of A. J. Mehan in this town for truth and veracity?
A. Yes, sir; I do.
Q. During what time?
A. Ever since he has been here.
Q. Was it good or bad?
A. Bad.

Cross-examination.

By Mr. ENGLISH:

Q. What did you trust him to the extent of three or four hundred dollars for if you knew his reputation was bad?
A. It is a very common occurrence to trust a man — that when you know their reputation to be bad.
148 Q. Do you know his reputation to be bad so far as paying bills is concerned?
A. Not when I first commenced dealing with him; we have dealt off and on ever since he has been in town.
Q. Have you had any dealing with him in three years past?
A. Not since he left here.
Q. How long did he leave here?
A. I can't tell exactly how long he did leave.
Q. Is it not a fact that you have had no business with him since these notes were signed?
A. No relation of debtor and creditor since that time, except interest.
Q. And that was April 11, 1887?
A. I presume.
Q. All your dealings occurred with him before his name was ever connected with the Daley group of mines?
A. Yes, sir.
Q. Andy Mehan has not been in this town (interrupted)——
A. He came here two or three times, I think, since.
Q. For a very short space of time—a week or so?
A. Between here and Bisbee; yes, sir.
Q. What do you know about his reputation where he has lived for five years?
A. I don't know where he has lived for five years.
Q. Is it not a fact that he has lived in Pueblo, Colorado, for the last five years?

A. I don't know.
Q. Do you know anything about his reputation there?
A. No, sir.
Q. Or in El Paso?
A. No, sir.
Q. Or Nogales?
149 A. No, sir.
Q. Or Phœnix?
A. No, sir.
Q. Then what you have testified to is the conclusion you came to while having business and other dealings with him several years ago?
A. Yes, sir.
Q. Who have you heard speak of his reputation for truth and veracity?
A. Generally throughout the town.
Q. Name the men you have heard speak of it.
A. I know, for instance, one case where the man jumped on a drummer named Briant.
Q. Sam.?
A. I don't know—Briant or Brant.
Q. Who does he travel for?
A. Levis Bros. and Co., of San Francisco.
Q. He jumped on him?
A. Yes; got him into a room and jumped on him.
Q. Does that prove that he would tell a lie?
A. That he would do anything he could to avoid (interrupted)——
Q. Did you make up your mind his reputation was bad because he jumped on a drummer?
A. I made up my mind from the general reputation that the man bore throughout the town.
Q. You are the plaintiff in this case?
A. I am.
Q. And have a large interest in the result?
A. Yes, sir.
Q. And know how important the deposition of Andy Mehan is in this case?
A. I do.
150 Q. Who else did you ever hear speak of his truth and veracity besides Brant?
A. Yourself, for instance.
Q. Do you recollect my saying that his reputation was bad for truth and veracity?
A. I could not recall exactly that; I won't be sure of that, but I know it was generally spoken of about town.
Q. Do you recollect of any particular man saying his reputation was bad for truth and veracity?
A. It was discussed generally about town.
Q. Did not you make an affidavit in this case that he was a resident of Pueblo, Colorado, within the last year?

A. Well, that I have to leave to my attorneys.
Q. (Exhibiting document.) Is this your signature?
A. It is.
Q. Sworn to before Mr. Staehle as notary public of this county?
A. Yes, sir.
Q. In this you set forth that "A. J. Mehan resides at Pueblo, in the State of Colorado." Did you not swear to that?
A. I did.
Q. Is it true?
A. If I signed it, I presume it was.
Q. Did you sign it?
A. I did.

By Mr. BARNES:

Q. You believed it was true then, did you?
A. I did.

Further cross-examination:

Q. It is true that he did reside there at that time?
151 A. I have no means of knowing it; I did not see him there.
Q. You signed the affidavit?
A. Yes, sir; from information.
Q. Who did you get it from?
A. I believe Judge Reilly mentioned something about that.
Q. Did you make this affidavit on information received from Judge Reilly?
A. I won't say as to that.
Q. Where did you receive your information that he resided in Pueblo, Colorado?
A. From rumor.
Q. You believed that he did?
A. It was asserted here.
Q. How long did he reside there?
A. I don't know.
Q. Do you know what his reputation for truth and veracity in Pueblo, Colorado, is?
A. I do not.

By Mr. BARNES:

Q. Do you know A. J. Mehan's handwriting?
A. I do.
Q. (Exhibiting letter.) Who wrote that letter?
A. A. J. Mehan.

By Mr. BARNES: This is the letter Judge Reilly produced this morning. I propose now to offer it in evidence.

Objected to as immaterial. Objection sustained. Exception by plaintiff.

By Mr. BARNES: I have here another letter, which I offer.

Objected to as immaterial.

By Mr. BARNES: It is to show that he claimed this property without any trust.

By the COURT: Let *to* go in.

152 (Exception by defendant.)

(At this point a discussion took place in regard thereto, and it was finally conceded by all parties that the pleadings in cases Nos. 1534 and 1535 in this court and all files and records of this court therein are considered as in evidence in this case.)

W. F. BRADLEY, recalled in rebuttal by plaintiff, testified:

Direct examination.

By Mr. BARNES:

Q. (Exhibiting documents.) Where have these been kept?
A. Kept on file of unpaid location notices.
Q. How long have they been there?
A. Since 1889.
Q. Since the date of filing?
A. January 19, 1889; yes.

By Mr. BARNES: These four location notices, one of Copper Crown, one of Diadem, one of Intervenor, and one of the Veteran, we offer them in evidence. They are as follows, viz., P, Q, R, S:

EXH. "P."

Location Notice.

Notice is hereby given that the undersigned, in compliance with the requirements of the mining act of Congress approved May 10th, 1872, *we* have this day located and claim (1,500) fifteen hundred linear feet along the course of this *load*, lead, or vein of mineral-bearing quartz and (300) three hundred feet in width on
153 each side of the middle of said lead, lode, or vein, situate in the Warren mining district, county of Cochise, Arizona, and more particularly described as follows, to wit:

Commencing at this monument of stones, being the center of the east end of claim and upon which this notice is posted, thence north three hundred (300) feet to a monument of stones; thence west fifteen hundred (1,500) feet to a monument of stones; thence south three hundred (300) feet to a monument of stones, being the center of west end of claim; thence south three hundred (300) feet to a monument of stones; thence east fifteen hundred feet to a monument of stones; thence north three hundred *feet* (300) feet to the place of beginning.

This claim is situated in the Warren mining district, about one and one-half miles east of the town of Bisbee, in Mule gulch, and joins the Erie Cattle Co.'s mine on the north side and joins the

Mountain Maid mine on its west end, and shall be known as t e Copper Crown mine, located Dec. 24th, 1888.

JAMES DALEY.
CHAS. E. BARTHOLOMEW.
G. S. BRADSHAW.

TERRITORY OF ARIZONA, } ss:
County of Cochise, }

I, A. Wentworth, county recorder in and for the county
154 of Cochise, do hereby certify that the above and foregoing is a full, true, and correct copy of the Copper Crown mining claim location notice, as appears of record now in my office, in Book 11, page 614.

In witness whereof I have hereunto set my hand and affixed my official seal, at my office, in Tombstone, this 10th day of February, A. D. 1893.

[SEAL.]

A. WENTWORTH,
County Recorder.

RECORDER'S OFFICE,
TOMBSTONE, COCHISE CO., A. T.

Filed and recorded, at request of C. E. Bartholomew, January 19th, A. D. 1889, at 9 a. m., Book 11, Record of Mines, page 614.

W. F. BRADLEY,
County Recorder.

Filed Feb. 10th, 1893.

A. H. EMANUEL, *Clerk.*

EXH. "Q."

Location Notice.

Notice is hereby given that the undersigned, in compliance with the requirements of the mining act of Congress approved May 10th, 1872, *we* have this day located and claim fifteen (1,500) hundred linear feet along the course of this lead, lode, or vein of mineral-bearing quartz and three (300) hundred feet in width on each side of the middle of said lead, lode, or vein, situate in the Warren mining district, county of Cochise, Arizona, and more particularly described as follows, to wit:

155 Commencing at this monument of stones, being the center of the east end of claim and upon which this notice is posted, thence north three hundred feet to a monument of stones; thence west fifteen hundred feet to a monument of stones; thence south three hundred feet to a monument of stones, being the center of the west end of claim; thence south three hundred feet to a monument of stones; thence east fifteen hundred feet to a monument of stones; thence north three hundred feet to the place of beginning.

This claim is situated about one and one-half miles east of the town of Bisbee, in Mule gulch and joins the Erie Cattle Co.'s mine

on its south side, and shall be known as the Diadem mine, located Dec. 24th, 1889.

JAMES DALEY.
CHAS. E. BARTHOLOMEW.
G. S. BRADSHAW.

Witness:
EDWARD KANE.

TERRITORY OF ARIZONA, } ss:
County of Cochise, }

I, A. Wentworth, county recorder in and for the county of Cochise, hereby certify that the above and foregoing is a full, true, and correct copy of the Diadem mining claim location notice, as appears of record now in my office, in Book 11, page 613.

156 In witness whereof I have hereunto set my hand and affixed my official seal, at my office, in Tombstone, this 10th day of February, A. D. 1893.

A. WENTWORTH,
County Recorder.

RECORDER'S OFFICE,
TOMBSTONE, COCHISE CO., A. T.

Filed and recorded, at request of C. E. Bartholomew, January 19th, A. D. 1889, at 9 a. m., Book 11, Records of Mines, pages 613.

W. F. BRADLEY,
County Recorder.

Filed Feb. 10th, 1893.

A. H. EMANUEL, *Clerk.*

EXH. "R."

Location Notice.

Notice is hereby given that the undersigned, in compliance with the requirements of the mining act of Congress approved May 10th, 1872, *we* have this day located and claim fifteen hundred (1,500) linear feet along the course of this lead, lode, or vein of mineral-bearing quartz and three hundred feet in width on each side of the middle of said lead, lode, or vein, situate in Warren mining district, Cochise county, Arizona, and more particularly described as follows, to wit:

Commencing at this monument of stones, being the center of the west end of claim and upon which this notice is posted,
157 thence three hundred feet to a monument of stones; thence east fifteen hundred feet to a monument of stones; thence south three hundred feet to a monument of stones, being the center of east end of claim; thence south three hundred feet to a monument of stones; thence west fifteen hundred feet to a monument of stones; thence north three hundred feet to the place of beginning.

This claim is situated about one and one-half miles east of the

town of Bisbee, in Mule gulch, and joins the Erie Cattle Co.'s mine on its west end, and shall be known as the Intervenor mine; located December 24th, 1888.

JAMES DALEY.
CHAS. E. BARTHOLOMEW.
G. S. BRADSHAW.

Witness:
EDWARD KANE.

TERRITORY OF ARIZONA, } ss:
County of Cochise, }

I, A. Wentworth, county recorder in and for the county of Cochise, do hereby certify that the above and foregoing is a full, true, and correct copy of the Intervenor mining claim location notice, as appears of record now in my office, Book 11, page 613.

In witness whereof I have hereunto set my hand and affixed my official seal, at my office, in *in* Tombstone, this 10th day of February, A. D. 1893.

A. WENTWORTH,
County Recorder.

158 RECORDER'S OFFICE, TOMBSTONE, COCHISE CO., A. T.

Filed and recorded, at request of C. E. Bartholomew, January 19th, A. D. 1889, at 9 a. m., Book 11, Record of Mines, pages 613.

W. F. BRADLEY,
County Recorder.

Filed February 10th, 1893.

A. H. EMANUEL, *Clerk.*

EXH. "S."

Location Notice.

Notice is hereby given that the undersigned, in compliance with the requirements of the mining act of Congress approved May 10th, 1872, *we* have this day located and claim one thousand linear feet along the course of this lead, lode, or vein of mineral-bearing quartz and three hundred or less feet in width on each side of the middle of said lead, lode, or vein, situate in the Warren mining district, county of Cochise, Arizona, and more particularly described as follows, to wit:

Commencing at this monument of stones, being the center of the west end of claim and upon which this notice is posted, thence south three hundred or less feet to a monument of stones, thence east one thousand or less feet to a monument of stones, thence north three hundred or less feet to a monument of stones, being the center of east end of claim; thence north three hundred or less feet to a monument of stones, thence west one thousand or less feet to
159 a monument of stones, thence south three hundred or less feet to the place of beginning.

This claim is situated about one mile east of the town of Bisbee and joins the Stars and Stripes mine on its west side line and the Angel and Cleveland mine on the north, and shall be known as the Vet-ran mine; located Dec. 24th, 1889.

CHAS. E. BARTHOLOMEW.
R. D. DICKEY.
JOHN LENOARD.

Witness:
JAMES DALEY.

TERRITORY OF ARIZONA, } ss:
County of Cochise, }

I, A. Wentworth, county recorder in and for the county of Cochise, do hereby certify that the above and foregoing is a full, true, and correct copy of the Vet-ran mining claim location notice as appears of record now in my office, in Book 11, page 614.

In witness whereof I have hereunto set my hand and affixed my official seal, at my office, in Tombstone, this 11th day of February, A. D. 1893.

[SEAL.]

A. WENTWORTH,
County Recorder.

RECORDER'S OFFICE, TOMBSTONE, COCHISE CO., A. T.

Filed and recorded, at request of C. E. Bartholomew, January 19th, 1889, at 9 a. m., Book 11, Record of Mines, pages 614.

W. F. BRADLEY,
County Recorder.

160 Filed Feb. 10th, 1893.

A. H. EMANUEL, *Clerk.*

Objected to as immaterial.

By Mr. REILLY: The law provides that these notices be made in duplicate, and, as these are only one copy, they do not, therefore, contradict the witness.

(Admitted.) Exception by defendant.

Plaintiff rests in rebuttal.

JAMES REILLY, recalled in subrebuttal, testified:

Direct examination.

By Mr. ENGLISH:

Q. Have you ever seen the original location notices of the mines known as the Daley group of mines, including those mentioned in the complaint and cross-complaint in this action?

Objected to as an effort to bolster up their own witness. Objection overruled. Exception by pl't'ff.

A. I had those in my possession, given to me by Angela Diaz, before I brought the two first actions.

Q. They were in her possession, then?

A. She gave them to me, and I returned them to her.
Q. That is all.

(Cross-examination declined.)

161 Defendant rests in surrebuttal.
Rest all.
Testimony closed.
Argument followed, and the court took the case under advisement.

The foregoing 102 pages and documents herein referred to and to be copied into the transcript of the clerk when directed *is* submitted to the opposite party, the defendant, by plaintiff as a full statement of facts in the trial of this cause, and *is* by the plaintiff agreed to as such.
Dec. 16th, 1892.

W. H. BARNES,
Att'y for Plaintiff.

The foregoing statement of facts *were* submitted to *me* this — day of December, 1892, and is by us agreed to as a statement of facts.

—— ——,
—— ——,
Attorneys for Defendant.

162 ADOLPH COHN *vs.* MEHAN ET AL. } No. 1614.

We agree that the foregoing — pages of typewriting entitled in the above cause contains a transcript of the reporter's notes taken at the trial of said cause, which was filed therein with the clerk of the court November 25th, 1892, but said pages also contain matter not in such transcript when so filed, to wit:
"Clerk will here copy said notice in transcript," and many such commands, commencing on page 3 of transcript, all commanding or directing the clerk to insert in his transcript all the documentary evidence introduced by plaintiff (appellant) at the trial, but none, except in one instance, of the documentary evidence of defendant (appellee), though defendant introduced in evidence many documents, including the deposition of A. J. Mehan, as shown by said transcript, pages 37 to 40, inc., and the alleged "statement of facts" is not such nor even a fair statement of the evidence, and we do not agree thereto.

JAMES REILLY,
Attorney for Angela Diaz.
ALLEN R. ENGLISH, *Of Counsel.*

163 Counsel for plaintiff in the above-entitled cause of Cohn *vs.* Mehan *et al.* having heretofore, to wit, on the 16th day of December, 1892, submitted to me a statement of facts in said cause, and the same having been thereupon submitted to counsel for de-

fendants and being by them disagreed to as correct and being likewise found by me to be incomplete because omitting documentary evidence, said counsel for plaintiff did thereafter, to wit, on the 6th day of March, 1893, submit the foregoing as an amended statement of facts in said cause, and the same was on said sixth day of March, 1893, by me approved and signed.

RICHARD E. SLOAN, *Judge.*

164 In the District Court of the First Judicial District of the Territory of Arizona in and for Cochise County.

ADOLPH COHN, Plaintiff and Appellant,
vs.
A. J. MEHAN, DEWITT C. TURNER, BELL H. CHANDLER, F. C. Fisher, and Angela Dias de Daley, Defendants and Appellees.

Assignment of Errors.

And now comes the appellant and alleges that there is manifest error in the record and proceedings as follows, viz:

1st. The court erred in the admission of irrelevant and incompetent testimony, in that the court admitted in evidence the deposition of A. J. Mehan, which said deposition is in all respects irrelevant to any issue raised in the pleadings; that said testimony should have been excluded because in it is contained statements invalidating his title, and is otherwise irrelevant and incompetent.

2nd. The court erred in refusing to allow testimony tending to contradict statements made in Mehan's deposition. (See Broad's testimony in transcript.)

165 3rd. The court erred in refusing to permit the evidence of the defendant Mrs. Daley, given before the coroner's jury in the inquest held on the body of one Lowther, which testimony tended to show that she was never married to Daley, and on the further ground that the said deposition before the coroner tended to contradict the statements made by the said defendant on the trial of the said cause. (See page 54, Transcript.)

4th. The court erred generally in admitting improper evidence and refusing to admit proper and competent evidence; to which ruling exception was taken at the time.

5th. The judgment should be set aside and a new trial granted; because it is not sustained by the evidence, in that—

(*a.*) The evidence does not support the judgment, because there is no evidence showing any facts which in law creates a resulting trust in favor of the defendant Mrs. Daley.

(*b.*) The evidence fails to show that plaintiff had any actual or constructive notice of any equities in the defendant Mrs. Daley at the time of the attachment by plaintiff Cohn or at the time of purchase of the property by him.

(*c.*) The evidence, on the contrary, shows that plaintiff Cohn was an innocent purchaser for a valuable consideration without notice.

(*d.*) The evidence shows that any money advanced by Mrs. Daley was a loan, and no trust could result in her favor.

166 (*e.*) The testimony of Mrs. Daley shows at best that it was community property and not separate estate.

(*f.*) There is no testimony tracing the money claimed as the separate property of Mrs. Daley to any particular piece of property in controversy in this action.

(*g.*) The evidence of Mrs. Daley shows that Mr. and Mrs. Daley located the property after marriage, and the act of location made the property community, subject *subject* to the disposal of the husband. (See Transcript, pp. 35, 36.)

(*h.*) The evidence shows that all money expended by Mrs. Daley was subsequently spent for support of the family and for assessment-work on the mines, no trust resulting. (See Transcript, 37.)

6th. The court erred in admitting in evidence the record in the divorce suit, Daley *vs.* Daley.

7th. The court erred in admitting the record in the case of Daley *vs.* Daley *et al.*, the plaintiff not being bound by it.

8th. The court erred in refusing to permit plaintiff to show that Mr. and Mrs. Daley were not husband and wife at the time of the location of the claims in controversy.

9th. The court — in permitting the *lis pendens* filed by Mrs. Daley after the attachment by Cohn and filed in and to which Cohn was not a party.

10th. The judgment is not supported by the evidence:

(1st.) In that Mehan's testimony was irrelevant; and

167 (2nd.) If relevant, it was broken down by testimony as to his reputation for truth and veracity and by proof of contradictory statements made elsewhere.

(3rd.) The burden of proof being on defendants to prove a trust in favor of Mrs. Daley, there is no evidence in the record tending to show facts from which any trust could result.

11th. The evidence shows that the plaintiff Cohn was at the time of filing this suit the owner of the property described in the complaint.

12th. The court erred in overruling the motion for new trial.

13th. The court erred in rendering judgment for defendants.

BARNES & MARTIN,
Attorneys for Pl't'ff.

Title of Court and Cause.

No. 1614.

Whereas in the above numbered and entitled cause, pending in the district court of the first judicial district of the Territory of Arizona in and for the county of Cochise, at a regular term of said court, to wit, on the 25th day of November, 1892, the said de-

168 fendant, Angela Dias, recovered judgment against the said plaintiff, Adolph Cohn, for the sum of $91.50 *dollars*, with interest thereon from the 25th day of November at seven per cent. per

annum and all costs of suit, from which judgment the said plaintiff, Adolph Cohn, has taken an appeal to our supreme court:

Now, therefore we, Adolph Cohn, as principal, and S. Tribolet and Emil Sydow, as sureties, acknowledge ourselves bound to pay the defendants, Angela Dias, the sum of three hundred dollars, conditioned that the said Adolph Cohn, appellant, shall prosecute his appeal with effect and will pay all costs which have accrued in the court below or which may accrue in the appellate court.

Witness our hands this 9th day of January, 1893.

ADOLPH COHN.
S. TRIBOLET.
EMIL SYDOW.

I have fixed the probable amount of the costs of the suit of both the appellate court and the court below at $300 *dollars*, and approve the foregoing bond this 9th day of January, 1893.

A. H. EMANUEL,
Clerk District Court, Cochise Co., A. T.

169 TERRITORY OF ARIZONA, } ss:
County of Cochise, }

S. Tribolet and Emil Sydow, the sureties on the foregoing bond, being by me first severally duly sworn, upon oath say that they are householders, residents within said county, and are each worth double the amount for which they have signed, over and above all their just debts and liabilities, exclusive of property exempt from execution *of* forced sale.

S. TRIBOLET.
EMIL*S* SYDOW.

Subscribed and sworn to before me this 9th day of January, A. D. 1893.

A. H. EMANUEL,
Clerk Dist. Court. [SEAL.]

(Endorsed:) No. 1614. Title court and cause. Bond on appeal. Approved and filed Jan. 9th, 1893. A. H. Emanuel, clerk.

TERRITORY OF ARIZONA, } ss:
County of Cochise, }

I, A. H. Emanuel, clerk of the district court of the first judicial district of the Territory of Arizona in and for the county of
170 Cochise, *to* hereby certify the foregoing to be a correct transcript of all the proceedings in the cause entitled A. Cohn, plaintiff, *vs.* A. J. Mehan *et al.*, defendant-, now on file in my said office. I further certify that said transcript was demanded by attorneys for A. Cohn, plaintiff and appellant, on the sixth day of March, 1893, and delivered to the attorneys for said appellant on the 29th day of Sept., 1893.

In witness whereof I have hereunto set my hand and seal of my said office this 29th day of Sept., 1893.

[SEAL.] A. H. EMANUEL, *Clerk.*

171 In the Supreme Court of the Territory of Arizona.

ADOLPH COHN, Plaintiff,
vs.
A. J. MEHAN ET AL., Defendants.

In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Cochise.

ANGELA DIAS DE DALEY, Plaintiff,
vs.
JAMES DALEY, ANDREW J. MEHAN, and DEWITT C. TURNER, Defendants.

Plaintiff above named complains of defendant- above named — alleges:

That plaintiff is a resident of the county of Cochise, Territory of Arizona, and the defendant- Andrew J. Mehan and Dewitt C. Turner are residents of the county of Pueblo, State of Colorado, and the defendant James Daley is a non-resident of the Territory, whose place of residence is unknown to plaintiff.

172 That plaintiff and said James Daley intermarried in the aforesaid county of Cochise on the 5th day of January, 1883, and lived and cohabited together as man and wife from that day until the 11th day of April, 1890; that on the day last aforesaid the said James Daley left plaintiff in the county aforesaid with the intention of abandoning her, and with the intention aforesaid has absented himself from plaintiff for more than six month- next before the filing of this complaint, and plaintiff has commenced an action against said James Daley in the court for a divorce from the bonds of matrimony existing between said defendant, James Daley, and plaintiff and for the recovery of her separate property, as hereinafter described.

That at the time of the intermarriage of plaintiff with said defendant, James Daley, as hereinbefore set out, the said James Daley had no property or means of any kind and plaintiff had three thousand dollars in United States currency and coin in her own right.

That during the time aforesaid, to wit, between the 5th day of January, 1883, and the 11th day of April, 1890, plaintiff and defendant invested all of said sum of three thousand dollars in locating, prospecting, buying, and developing mines and mining claims in Warren mining district, in the aforesaid county of Cochise, and in building a residence and *and* improving a garden lot on the

173 surface of one of said mining claims of about three acres in extent, and on and prior to the said 11th day of April, 1890, all of plaintiff's said money was invested in said mines and mining claims and the residence and garden aforesaid, and by the expenditure thereof plaintiff and defendant had procured and maintained the title to the following-described mining claims and the home and garden aforesaid, to wit:

The "George Washington" mine, located Jan. 1st, 1887, and recorded in Book 11, Records of Mines, at page 225.

The "Old Republic" mine, located December 15th, 1888, and recorded in Book 9, Records of Mines, pages 84 & 85.

The "Copper Frying Pan" mine, located January 22nd, 1889, and recorded in Book 11, Records of Mines, at page 628.

The "Angel" mine, located January 1st, 1887, and recorded in Book 11, Records of Mines, at page 225.

The undivided (½) half interest in and to the "Irish Mag" mine, located January 1st, 1886, and recorded in Book 11, Record of Mines, at page 104.

The undivided (⅓) one-third interest in and to the "Copper Monarch" mine, located July 28th, 1886, and recorded in Book 11, Record of Mines, page 555.

The undivided one-third (⅓) interest in and to the "Intervenor" mine, located December 24th, 1888, and recorded in Book 11, Records of Mines, at page 613.

174 The undivided one-third (⅓) interest in and to the "Old Canteen" mine, located January 1st, 1889, and recorded in Book 9, Record of Mines, at pages 89 and 90.

The undivided one-third (⅓) interest in and to the "Diadem" mine, located January 24th, 1888, and recorded in Book 11, Record of Mines, at page 613.

All of which records of mines herein referred to are in the office of the county recorder of the aforesaid county of Cochise.

Also one residence house, outhouses, and garden containing about three acres of well-cultivated land, planted to fruit trees, and situate on the southerly end of the "George Washington" mine, hereinbefore described.

That during all the times hereinbefore set out plaintiff was and still is ignorant of the language, laws, and customs of the United States of America, and defendant was reasonably well acquainted with the same, and defendant during said coverture took and kept the title to all of said property in his own name without the consent or knowledge of plaintiff.

That on the 2nd day of September, 1890, after said defendant, James Daley, had abandoned plaintiff, the said defendant, intending and contriving to cheat and defraud plaintiff out of her

175 said property, executed a deed of all said property to the defendant Andrew J. Mehan without any consideration therefore, but for the sole purpose of cheating and defrauding plaintiff out of the same and enabeling the said Mehan to sell the same for the benefit of said Daley, which deed has been recorded in the office of the county recorder of the aforesaid county of Cochise, in Book 11, Deeds of Mines, at page 226; and thereafter, on the 15th day of September, 1890, the said defendant, Andrew J. Mehan, intending and contriving to aid and further the fraud of the said defendant, Daley, executed a deed of one-half undivided of all said property to the defendant Dewitt C. Turner without any consideration therefore, but for the sole purpose of cheating and defrauding plaintiff out of the said property, which deed has been recorded in the office

of the county recorder of the county of Cochise aforesaid, in Book 11, Deeds of Mines, at page 228.

Wherefore plaintiff prays a judgment and decree of this court against defendants that all of the property hereinbefore described to the amount of three thousand dollars is her separate property, and that she is entitled to one-half of the remainder of said property over three thousand dollars.

2nd. That the deed made by the defendant Daley to the defendant Mehan is fraudulent and void and without consideration, and that the deed of the defendant Mehan to the defendant
176 Turner is without consideration and void as to the interest of plaintiff and as to all of said property except as to the one-half of said property after deducting therefrom the sum of three thousand dollars.

3rd. That said property be sold by order of this court, and that plaintiff receive three thousand dollars of the proceeds thereof and one-half of the remainder of said proceeds, and that the other half of said remainder be paid to defendants or either of them as may appear just.

4th. And for such other and further judgment and decree as may appear equitable and for costs of suit.

JAMES REILLY,
Pl'tff's Att'y.

Endorsed: No. 1535. Title of court and cause. Complaint. Filed Oct. 18, 1890. A. H. Emanuel, clerk.

TERRITORY OF ARIZONA, } ss:
County of Cochise, }

I hereby certify the annexed and foregoing to be a full, true, and correct copy of the original complaint in the cause entitled Angela Dias de Daley *vs.* James Daley *et al.*—reg. No., 1535—on file in the clerk's office of the district court of the first judicial district of the Territory of Arizona in and for the county of Cochise.

Witness my hand and the seal of said court this 3rd day of October, A. D. 1893.

[SEAL.]
176½ A. H. EMANUEL, *Clerk,*
By —— ——, *Deputy Clerk.*

(Endorsed:) No. 390. In the supreme court, Territory of Arizona. Adolph Cohn, appellant, *vs.* A. J. Mehan *et al.*, appellee-. Supplement to record. Filed Dec. 25, 1893. T. D. Hammond, clerk.

In the Supreme Court of the Territory of Arizona.

ADOLPH COHN
vs.
A. J. MEHAN, ANGELA DIAS, ET AL.

Now comes the appellee Angela Dias and moves this honorable court for an order striking out from the transcript filed by appellant in this court in the above-entitled cause the following, to wit:

First. Strike out the alleged state- of facts, pages thirty to one hundred and thirty-four, both inclusive, of said transcript, on the ground that said alleged statement of facts was not approved, settled, nor signed by the trial judge, nor filed with the clerk of the trial court within the time allowed by statute.

177 Second. Strike out *of* the appellant's bill of exceptions, pages twenty-three to twenty-nine of said transcript, on the ground that the same does not contain a statement "with such circumstances" or so much of the evidence as is necessary to explain the same.

Third. Strike out *of* the appellant's assignment of errors on the ground that the appellant did not file the same with the clerk of the court below before he took the transcript of the record from the office of said clerk.

Fourth. Strike out a paper filed with the transcript in this cause in this court on December 25th, 1893, entitled "Supplement to record," on the ground that the same is not a part of the record by law, nor made a part thereof by statement of facts or bill of exceptions.

JAMES REILLY,
ALLEN R. ENGLISH,
Att'ys for Appellee.

(Endorsed:) No. 390. In the supreme court, Territory of Arizona. Adolph Cohn, appellant, *vs.* A. J. Mehan *et al.* Motion to strike out. Filed January 9, 1894. J. L. B. Alexander, clerk.

178 In the Supreme Court of the Territory of Arizona.

ADOLPH COHN, Appellant,
vs.
A. J. MEHAN, ANGELA DIAS, ET AL.

Now comes appellee Angela Dias and moves this honorable court for an order dismissing the appeal in this cause on the grounds:

1st. That there is no transcript on appeal in said cause filed in this court, properly certified as required by law.

2nd. That the bond on appeal is insufficient in this, the sureties thereon are not bound for double the amount of the probable costs of both the appellate court and the court below, as provided by statute, paragraph 859, Revised Statutes.

JAMES REILLY,
Attorney for said Appellee.

ALLEN R. ENGLISH, *Of Counsel.*

(Endorsed:) No. 390. In the supreme court of the Territory of Arizona. No. 390. A. Cohn *vs.* A. J. Mehan *et al.* Motion to dismiss appeal. Filed Jan'y 9, '94. J. L. B. Alexander, clerk.

179 Be it remembered that on the 9th day of January, 1894, the same being one of the judicial days of the January term, 1894, of the supreme court of Arizona, the following proceedings

were had in said court in the above-entitled cause, to wit: It is ordered that appellant have until January 11th, 1894, to answer motion filed this day by appellee to dismiss.

In the Supreme Court of the Territory of Arizona.

ADOLPH COHN
vs.
A. J. MEHAN, ANGELINA DIAS, ET AL.

Now comes Adolph Cohn, appellant, and to the motion filed by Angelina Dias to strike out from the transcript the statement of facts, the bill of exceptions, assignment of errors, and the supplemental paper filed December 25th, 1893, *and* says:

I.

That if the court will look at the transcript on file it will be found that there is a very voluminous document, unskillfully prepared and carelessly put together, though it has cost appel-
180 lant twenty cents for every hundred words contained in it, and so is a very expensive document. While it is inartistic, it is yet a complete transcript of the record, and everything can be found in it by diligent search.

As to the statement of facts, the transcript shows that judgment was rendered November 25, 1892, and that motion for a new trial overruled November 26, 1892.

That on the 16th day of December, 1892, appellant submitted a statement of facts which contained all the evidence as written out by the stenographer in the case, and in that report was stated in its proper order every fact or documentary evidence offered in evidence by both plaintiff and defendant. At the time of its preparation these documents were either in the hands of the opposite party or filed with the clerk; hence the party who prepared the statement of facts, when it came to any particular document, described it, by way of illustration, as follows:

"The plaintiff," "the defendant," as the case might be, "here offered in evidence the judgment-roll in the case of Daly *vs.* Daly from the records of the district court of Cochise county; which said judgment-roll is in words and figures following, to wit:" Then came a note in brackets directing the clerk, when the transcript is made up, to at that point insert the said judgment-roll. So with reference to every document.

181 This transcript was submitted to the opposing counsel, and the court will see the stipulation of opposing counsel that this statement of facts was correct, making no objection thereto as being erroneous in any particular, but stated that the documentary evidence referred to was not written out, and hence declined to approve it. The opposing counsel offered no statement of facts, as they had a right to do under the statute, as against this one, and it was then submitted to the judge to be approved and signed by him.

Afterwards all these documents, as appear- by the statement of

facts itself, were all copied and attached to the statement of facts, and so, by reference, indicating their place in the case, and a complete and perfect statement of facts was made, and, when so made, was signed by the judge. The said statement of facts was signed by the judge on the 6th day of March, 1893.

The November term of the district court of Cochise county, the court will take knowledge, began on the second Monday in November, according to law, and continued its term until long after the signing of the statement of facts by the court. The terms of court in Cochise county are by law fixed for the second Monday in May and the second Monday in November, and the November court continued and was not finally adjourned until long after the signing of this statement of facts. Sections 843, 844, and 845,
182 Revised Statutes, bear upon the question of the statement of facts:

"845. (SEC. 195.) After the trial of any cause either party may make out a written statement of the facts given in evidence on the trial and submit the same to the opposite party or his attorney for inspection. If the parties or their attorneys agree upon such statement of facts, they shall sign the same, and it shall then be submitted to the judge, who shall, if he find it correct, approve and sign it and the same shall be filed with the clerk during the term."

"844. (SEC. 196.) If the parties do not agree upon such statement of facts, or if the judge do not approve or sign it, the parties may submit their respective statements to the judge, who shall from his own knowledge with the aid of such statements, during the term, make out and sign and file with the clerk a correct statement of facts proven on the trial and such statement shall constitute a part of the record."

"845. (SEC. 197.) The court may by an order enter upon the record during the term, authorize the statement of facts to be made up and signed and filed in vacation, at any time not exceeding thirty days after the adjournment of the term."

This statement of facts was submitted to the judge and the opposite party. The parties did not agree, their difference applying solely to the documentary evidence. The parties did not, as
183 provided in section 844, submit respective statements to rest upon this one. The judge thereupon, upon his own motion and from his own knowledge, with the aid of the statement submitted by the plaintiff, during the term made out, signed, and filed with the clerk a correct statement of the facts, and the same signed this record as a proper and technical statement of facts in this case. It is not urged or contended that it is erroneous in any particular, and it contains all the evidence in the case. Hence there is no good ground for striking out this statement of facts contained in this transcript.

As for striking out the bill of exceptions, the exceptions taken upon the rulings of evidence designated and fully contained in the statement of facts is one of the proper ways of bringing the exceptions into the record.

As to the assignment of errors, an inspection will show that the

clerk has failed to note the date of its filing, but the transcript does show that it is included in the transcript and has been placed in the transcript prior to the certificate of the clerk, and hence preceded the certificate of the clerk. The certificate of the clerk was made on the 29th day of September, 1893, and that certificate says on that day the transcript was delivered to the counsel for appellant, and at the time of that certificate and delivery the transcript was
184 completed, and hence the assignment of errors was in the transcript before delivery. Hence it must have been filed in the district court before delivery. Upon that point the statute says that the law only requires that the assignment of errors shall be filed with the clerk before the party takes the transcript of the record from the clerk's office, and that a copy of such assignment shall be attached to and form a part of the record (section 940, Revised Statutes).

This assignment of error was attached to and formed a part of the record at the time it was delivered to the party; hence the statute is strictly and technically complied with.

As to the motion to strike out the paper filed with the transcript December 25, 1893, that paper is a certified copy of the amended complaint in the cause, which does not appear in the transcript—by some mistake was not included in it—and is certified to and filed here rather than to suggest a diminution of the record and have it certified to afterwards. Parties have the right to certify and file with the case any document which by mistake may be omitted in order to make a complete transcript.

This transcript complies with the statutes in every particular. Although the court will find some difficulty, owing to the faulty make-up on the same, in finding in it all the essential facts, yet they are there and will be found if diligently sought for.
185 Very respectfully submitted.

W. H. BARNES,
Attorney for Appellant.

(Endorsed:) No. 390. Cohn *vs.* Mehan. Reply to motion to strike out. Filed January 11, '94. J. L. B. Alexander, clerk.

In the Supreme Court of the Territory of Arizona.

ADOLPH COHN
vs.
A. J. MEHAN, ANGELINA DIAS, ET AL.

As to the motion to dismiss appeal, comes the appellant and says that as to the first ground, that there is no transcript on file properly certified, *says* that the court will find, upon inspection, that the transcript complies with the law and is properly certified.

The appellee in his motion does not point out any defects in the transcript; simply says that there is no transcript properly
186 certified to. I insist the court should consider no such general ground, but should only consider such a motion where the particular defeat is pointed out.

As to the bond on appeal, the court will find upon inspection that the clerk certified that the costs below were $91.00 taxed against the plaintiff or the appellant here. The bond is for $300.00.

The court will take judicial knowledge that the appellee's costs in this case in this court can be in no event but a very few dollars. The most of the costs are made by appellant, and of course have been advanced by him, and deposit made to cover appellant's costs. The only cost of appellee can be cost of filing motions and the cost of filing brief and argument. A bond of $300.00 was filed below and approved by the clerk. It is true that the clerk does certify that the amount of probable costs will be $300.00. His approval of this bond indicates that he intended $150.00 to be the amount which would be ample to cover all costs in this court and the court below. If it be held that this bond, as to its amount, does not technically comply with the statute, yet it does clearly cover any possible damages that may be incurred by the appellee, is offered in good faith to comply with the statute, and is sufficient to give this court jurisdiction, and if the court think that this bond is not sufficient in amount, the appellant makes a cross-motion for
187 leave within a reasonable time fixed by the court to file a new bond.

Respectfully submitted.

W. H. BARNES,
Attorney for Appellant.

(Endorsed:) 390. Cohn *vs.* Mehan. Reply to motion to dismiss. Filed January 11, '94. J. L. B. Alexander.

Be it further remembered that on the 11th day of January, 1894, the same being one of the judicial days of the January term, 1894, of the supreme court of Arizona, the following proceedings were had in said cause in said court, to wit:

It is ordered that the appellee have ten days to reply to the brief of the appellant filed in this cause, and the cause be considered as submitted upon filing of said reply.

188 In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Cochise.

ADOLPH COHN, Plaintiff and Appellant,
vs.
A. J. MEHAN ET AL., ANGELA DIAS, Appellee.

I, A. H. Emanuel, clerk of the above-named court, do hereby certify that the November term of said court for the year 1892 was finally adjourned for said term on December 29th, 1892, as appears to me from the records of said court on file in my office.

This certificate is made at the request of counsel for Angela Dias, for the reason that the matter therein contained does not appear in the transcript certified to by me in the above-entitled cause now in the supreme court.

[SEAL.]

A. H. EMANUEL,
Clerk District Court.

Dated January 16th, 1894.

(Endorsed:) 390. No. 1614. In the district court of the first judicial district, county of Cochise. Adolph Cohn *vs.* A. J. Mehan *et al.* Certificate of clerk. Filed Jan'y 22, '94. J. L. B. Alexander, clerk.

189 In the Supreme Court of the Territory of Arizona.

ADOLPH COHN, Plaintiff,
vs.
A. J. MEHAN ET AL., Defendants.

William H. Barnes, being first duly sworn, on oath states:

That the intimation of James Riley, attorney for appellee, in his brief filed, that the assignment of errors was attached to the transcript after the same was certified by the clerk, after the same was delivered from the hands of the clerk to the appellant, is untrue; that on the 29th day of September the transcript was delivered to the affiant in exactly the condition and shape that it now is, with the assignment of errors therein, as it now appears in the transcript. The same has not been changed or altered in the least particular since the moment that it was certified to by the clerk on the 29th day of September, 1893, and delivered to the appellant.

And affiant also states that on the 16th day of December, 1892, which was as soon after the trial as he could, he procured
190 from B. W. Tichnor, the shorthand reporter, the transcript of the notes of the trial by Tichnor, the shorthand reporter of said trial, who prepared the statement of facts exactly as it now appears in the transcript, without changing a word or altering a line, and submitted the same to the opposing counsel, and handed the same to the court to be signed by him; that at the time he did so he noted in the said statement of facts a memorandum that at that particular place that certain particular documentary evidence was then and there offered in evidence in words and figures following, to wit, with the direction that the clerk of the court immediately proceed to copy the same into the transcript; that the documents were then and there on file with the clerk or in the hands of opposing counsel, and that affiant requested the clerk to proceed at once to copy the documents into the statement of facts such as were in his possession, and to secure from opposing counsel the documents which were not in his hands and insert them in the transcript; that upon page 132 of the transcript appears affiant's memorandum that on that day he submitted the document so prepared to the opposing counsel, and the judge on page 134 certified that the transcript was handed to him on that day; that the delays from then on were not caused by appellant nor by his counsel, but it was due to the fact that the court was considering of the question and the opposing counsel were making no effort nor affording any aid to produce the documents and to enable the clerk to copy the documentary
191 evidence referred to; that the court, Judge Sloan, was busy trying other cases, and the affiant, acting for the appellant, frequently spoke to the judge upon the subject, asking him to give

it his attention and to execute the same; that the judge frequently expressed his willingness so to do, but owing to the press of other business it was not done, but it was through no fault of the appellant or of his counsel or of affiant; that appellant and affiant did all that they could do, and that the delay was due, not to the fault of the judge, but to the fact that he was engaged in other business and unable to give it the prompt attention, and hence this statement of facts, so far as this appellant is concerned, should be treated as finally signed and disposed of on the 16th day of December, 1892; that that was the date on which he prepared the document as it now appears, without the changing of a word or line, unless it be considered that the insertion of the documents referred to and in the hands of the clerk be regarded as changing the document.

And further he saith not.

WM. H. BARNES.

Subscribed and sworn to before me this 22nd day of January, A. D. 1894.

[SEAL.] J. L. B. ALEXANDER, *Clerk.*

192 (Endorsed:) 390. Cohn *vs.* Mehan. Affidavit of Wm. H. Barnes. Filed Jan'y 22, '94. J. L. B. Alexander, clerk.

Be it further remembered that on the 22nd day of January, 1894, the same being one of the judicial days of the January term, 1894, of the supreme court of Arizona, the following proceedings were had in said court in said cause, to wit:

The appellant, by his attorney, Wm. H. Barnes, presented an additional bond on appeal to this court for the approval of the court, which was taken by the court under consideration.

It was then ordered that appellant have five days to reply to appellee's brief filed herein, and that the case be submitted on the brief filed.

Be it further remembered that on the 25th day of January, 1894, the same being one of the judicial days of the January term, 1894, of the supreme court of Arizona, the following proceedings were had in said cause in said court, to wit:

193 The sufficiency of the bond on appeal filed in the court below and the supplemental bond filed in this court by the appellant having been heretofore submitted and by the court taken under consideration, and the court having fully considered the same and being fully advised in premises, the court finds that the original bond on appeal is sufficient as to form, but not as to amount; under the supplemental bond is sufficient as to amount, but not as to form; therefore it is ordered that appellant have leave to file a sufficient bond herein and reply brief to appellee brief herein on or before January 29th, 1894, and that this cause stand submitted in brief at the incoming of said bond and brief.

In the Supreme Court of the Territory of Arizona.

A. COHN
vs.
ANGELINA D. DAILEY ET AL.

Whereas, in the above-entitled case, pending in said court on appeal from the district court of the first judicial district of the Territory of Arizona in and for the county of Cochise, leave was
194 given to the appellant, A. Cohn, to file in said cause a new appeal bond in said cause, in which at the regular term of said district court of Cochise county, on the 25th day of November, 1892, the said defendant, Angelina D. Dailey, recovered a judgment against said plaintiff, A. Cohn, for the sum of ninety-one dollars and fifty cents ($91.50), with interest thereon from the 25th day of November aforesaid at seven per cent. per annum and all costs of suit, from which said judgment the said plaintiff, Cohn, appealed to the supreme court aforesaid:

Now, therefore, we, A. Cohn, as principal, and David Cohn and L. Tribolet, as sureties, acknowledge ourselves bound to pay the defendant Angelina D. Dailey the sum of six hundred ($600) dollars, conditioned that the said A. Cohn, appellant, shall prosecute his appeal in said supreme court with effect and will pay all costs which have accrued in the court below or which may accrue in the said supreme court.

A. COHN.
DAVID COHN.
S. TRIBOLET.

Witness our hands this 25th day of January, A. D. 1894.

195 TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

David Cohn and S. Tribolet, the sureties on the foregoing bond, being by me first severally duly sworn, upon oath say that they are householders, residents within said county, and are each worth double the amount for which they have signed over and above all their just debts and liabilities, exclusive of property exempt from execution or forced sale.

DAVID COHN.
S. TRIBOLET.

Subscribed and sworn to before me this 25th day of January, A. D. 1894.

[SEAL.]

B. A. FICKAS,
Notary Public.

(Endorsed:) 390. Additional bond of appellant. Filed Jan'y 25, '94. J. L. B. Alexander, clerk.

196 In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Cochise.

A. COHN
vs.
A. J. MEHAN and ANGELA DIAZ.

TERRITORY OF ARIZONA, } *ss:*
County of Cochise, }

A. H. Emanuel, clerk of the district court in and for the county of Cochise, hereby certifies that — the assignment of errors in the transcript certified by me in the above-entitled case and now on file in the supreme court the date of filing the assignment of errors was, by mistake, omitted, and as a matter of fact the said assignment of errors was filed in said court by me on the 19th day of September, A. D. 1893, as appears by the records of my office, and was attached to and a part of said transcript on the 29th day of September, A. D. 1893, as it now appears, when I certified to the same and delivered it to W. H. Barnes for appellant.

In witness whereof I have hereunto set my hand and affixed
197 the seal of said district court, at Tombstone, Cochise county, Arizona, this 27 day of January, 1894.

[SEAL.] A. H. EMANUEL, *Clerk.*

(Endorsed:) No. 390. In the supreme court, Arizona Territory. A. Cohn, appellant, *vs.* A. J. Mehan & Angela Diaz, appellees. Certificate of clerk district court as to time of filing of assignment of errors. Filed Jan'y 28, '94. J. L. N. Alexander, clerk.

Be it further remembered that on the 8th day of March, 1894, the same being one of the judicial days of the January term, 1894, of the supreme court of Arizona, the following proceedings were had in said cause in said court, to wit:

This cause having been heretofore submitted and by the court taken under consideration, and the court having considered the same and being fully advised in the premises, it is ordered that the judgment of the lower court be, and the same is hereby, affirmed; and it is further ordered, adjudged, and decreed that the appellees herein, A. J. Mehan, Dewitt C. Turner, Bell H. Chandler, F. C. Fisher, and Angela Dias de Daily, do have and recover of
198 and from the appellant, Adolph Cohn, and his sureties, David Cohn and S. Tribolet, on the appeal bond herein, the sum of $91.55, their costs in the court below, and the further sum of $—, their costs in this court.

In the Supreme Court, Arizona Territory.

ADOLPH COHN, Plaintiff & Appel't,
vs.
A. J. MEHAN ET ALS., Defendant- and Appellees.

And now comes the said appellant and moves the court for a rehearing of said cause for the reason that the court should have re-

versed for the reason that there is no evidence whatever of a resulting trust in favor of Mrs. Daley.

II.

There is no competent evidence of an express trust in the record.

III.

Hence the legal title was in Mehan at the time of the levy,
199 and there was no equity in Mrs. Daley she can enforce, and so the property sued for was subject to the judgment of Cohn.

And as the opinion of the court is not yet filed, appellant asks to be permitted to file and amend motion for a rehearing within a reasonable time after the filing of the opinion herein.

Respectfully submitted.

BARNES & MARTIN AND
WM. C. STALEY,
Attorneys for Appellant.

(Endorsed:) No. 390. In the supreme court, Territory of Arizona. Adolph Cohn, plaintiff and appellant, *vs.* A. J. Mehan *et al.*, defendant- and appellee-. Motion for rehearing. Filed March 15th, 1894. J. L. B. Alexander, clerk. Barnes & Martin, attorneys-at-law, Tucson, A. T.

200 In the Supreme Court of the Territory of Arizona, January Term, 1895.

ADOLPH COHN, Appellant,
vs.
ANGELINA DAILY ET ALS., Appellees.

And now comes the appellant and represents to the court that as no opinion has been filed in this case by which appellant can know what questions have been passed upon by the court, and as the appellant is desirous of perfecting an appeal to the Supreme Court of the United States in case a rehearing be not granted as asked for, asks the court, in case the rehearing be not granted, to either prepare findings with a view to such appeal or to make such suggestions as to the holding of the court in the case as will enable counsel to prepare the same and present them to the court for consideration with a view to having findings established in the case.

We would suggest that the court determine the following questions: Whether or not there was an express trust created by parole varying the deed from Daily to Mehan in evidence; and, if so, what facts the court finds as leading to that conclusion.

201 2nd. Whether or not a resulting trust exists in favor of Angelina Daily in the mines sued for in this case; and, if so, what facts the court finds as leading to that conclusion.

Very respectfully,
BARNES & MARTIN AND
M. A. SMITH,
Attorneys for Appellant.

(Endorsed:) No. 390. In the supreme court, Arizona Territory. Adolph Cohn, appellant, *vs.* Angelina Daily *et als.*, appellees. Motion for findings. Filed Jan'y 14, '94. J. L. B. Alexander, clerk. Barnes & Martin, attorneys at-law, Tucson, Arizona.

Be it further remembered that on the 16th day of January, 1895, the same being one of the judicial days of the January term, 1895, of the supreme court of Arizona, the following proceedings were had in cause in said court, to wit:

It is ordered that motion of appellant for rehearing in this cause be granted, and case is ordered placed at the foot of the calendar.

202 Be it further remembered that on the 17th day of January, 1895, the same being one of the judicial days of the January, term, 1895, of the supreme court of Arizona, the following proceedings were had in said cause *at* said court, to wit:

It is hereby ordered that all motions on file in this cause be deemed submitted, and that this case be considered in its regular order on the printed calendar of this court.

Be it further remembered that on the 29th day of January, 1895, the same being one of the judicial days of the January term, 1895, of the supreme court of Arizona, the following proceedings were had in said cause in said court, to wit:

On motion of James Reilly, for appellees, it is hereby ordered that he have leave to withdraw his brief in this cause to add additional authorities thereto, and appellant have three days after said authorities are added to reply to the same and cause be submitted on briefs.

Be it further remembered that on the 10th day of July, 1895, the same being one of the judicial days of the July term, 1895, of the supreme court of Arizona, the following proceedings were had in said cause in said court, to wit:

This cause having been heretofore submitted and by the court taken under consideration, and the court having fully con-

203 sidered the same and being fully advised in the premises, it is ordered that the judgment of the lower court rendered herein be, and the same is hereby, affirmed; and it is further ordered, adjudged, and decreed that appellee Angela Dias herein do have and recover of and from the appellant herein and S. Tribolet and Emil Sydow, the sureties on the appeal bond herein, the sum of ninety-one and $\frac{55}{100}$ dollars, her costs in the lower court, and her costs in this court, taxed at sixteen dollars.

In the Supreme Court of the Territory of Arizona, July Term, 1895.

ADOLPH COHN, Appellant,
vs.
ANGELINA DAILY ET AL., Appellees.

And now comes the appellant and moves the court, by virtue of the act of April 7, 1874, Sup. to R. S. U. S., pp. 12 and 13 (R. S.

Arizona, p. 33), to make and certify a statement of facts of the case in the nature of a special verdict, and also rulings of the court in admission and rejection of evidence to be transmitted to the
204 supreme court with the transcript of the decree. As no opinion in this case has been filed, counsel for appellant have not the data, nor does he know what the find-s and rulings of the court are, so that counsel cannot prepare the same, but counsel offers to draft such statements and findings of the court if the court will in any way indicate what the decision and findings are, and submit the same when drafted to the court for adoption.

W. H. BARNES,
Attorney for Appellant.

(Endorsed:) No. 390. Cohn *vs.* Daily. Motion for findings. Filed July 10, 1895. J. L. B. Alexander, clerk.

Be it further remembered that on the last-named date the following further proceedings were had in said cause in said court, to wit:

Mr. W. H. Barnes, for appellant herein, moved the court to make and file findings in this cause; whereupon the court ordered that said motion be denied.

Be it further remembered that on the 15th day of May, 1895, the same being one of the judicial days of the July term, 1895, of the supreme court of Arizona, the following proceedings were had in said cause in said court, to wit:

205 And now, on this 15th day of July, A. D. 1895, this day being one of the days of the July adjourned term of said court, and it appearing to the court that the amount in controversy is, *excessive* of costs, over $5,000, viz., $20,000, it is held in open court and ordered that the appeal be allowed as prayed for, upon appellant, Adolph Cohn, giving bond on appeal, according to law, in the penal sum of $1,000, sureties to be approved by the clerk of this court.

In the Supreme Court of the Territory of Arizona, July Term, 1895.

ADOLPH COHN, Appellant,
vs.
A. J. MEHAN ET AL., Appellees.

And now comes Adolph Cohn, the appellant, by William H. Barnes, his attorney, considering himself aggrieved by the judgment affirming said cause, and here, in open court, prays the court for an appeal of said cause to the Supreme Court of the United States.

He shows, by the affidavits of William H. Barnes and Andrew P. Payeken, that the amount in controversy in this cause,
206 exclusive of costs, is over $5,000, and he therefore asks that the appeal be allowed upon his executing bonds on appeal, conditioned according to law in such sum as the court may fix, the

same to be filed within such time as the court may order, and the same to be approved by the clerk of this court.

And he prays that a transcript of the record upon — said order or judgment of affirmance was made, duly authenticated, may be sent to the Supreme Court of the United States.

Amount in controversy is, *excessive* of costs, over $5,000, viz., $20,000.

W. H. BARNES,
Attorney for Adolph Cohn, Appellant.

And now, on the 15th day of July, A. D. 1895, this day being one of the days of the July adjourned term of said court, and it appearing to the court that —, it is held in open court and ordered that the appeal be allowed Adolph Cohn — filing bond on appeal according to law in the penal sum of $1,000.00; sureties to be approved by the clerk of the district court.

J. D. BETHUME, *C. J.*
OWEN ROUSE, *A. J.*
JNO. J. HAWKINS, *A. J.*

207 In the Supreme Court of the Territory of Arizona, July Term, 1895.

ADOLPH COHEN, Appellant,
vs.
ANGELINA DAILY ET AL., Appellees.

TERRITORY OF ARIZONA, *County of Yavapai*, } *ss:*

William H. Barnes, being duly sworn, on oath says that he was the attorney for the appellant in the district court and in this court; that he is well acquainted with the property which is the subject-matter of this suit and the value of the same; that the same consists of real estate, viz., the mining claims in the complaint described, and that the title to the same is involved in this controversy; that the value of the same is over $20,000.00, and he states that the full amount in controversy in this case, exclusive of costs, is over $5,000 and is of the value of more than $20,000.00.

Affiant states that he is not aware that the record in said cause shows the value of said property in controversy, and this affidavit is made for the purpose of showing directly the value of per-
208 fecting an appeal of said cause to the Supreme Court of the United States and of showing to said court that the said Supreme Court has jurisdiction of said cause on appeal so far as the value of the property or the amount in controversy is concerned.

WILLIAM H. BARNES.

Subscribed and sworn to before me this 13th day of July, 1895.

J. E. MORRISON,
Notary Public.

In the Supreme Court of the Territory of Arizona, July Term, 1895.

ADOLPH COHN, Appellant,
vs.
ANGELINA DAILY ET AL., Appellees.

TERRITORY OF ARIZONA,
County of Yavapai, } *ss:*

Andrew Payeken, being duly sworn, on oath states that he is acquainted with the property involved in this case and described
209 in plaintiff's complaint, and that the value of said property is over $5,000.00, and is of the value of about $20,000.00, and that the full amount in controversy in this cause, exclusive of costs, is over $5,000, and is of the value of about and more than $20,000.00.

Affiant states that he is not aware that the record in this cause shows the value of said property, and that this affidavit is made for the purpose of showing directly the value thereof to be about $5,000.00, exclusive of costs, and for the purpose of said Cohn perfecting an appeal of said cause to the Supreme Court of the United States and of showing to said court that the said Supreme Court of the United States has jurisdiction of said cause on appeal so far as the value thereof or amount in controversy is concerned.

ANDREW PAYEKEN.

Subscribed and sworn to before me this 13th day of July, 1895.
J. E. MORRISON,
Notary Public.

(Endorsed:) No. 390. In the supreme court of the Territory of Arizona. Adolph Cohn, appellant, *vs.* Angelina Daily *et al.*, appellees. Prayer for appeal. Filed July 15th, 1895. J. L. B. Alexander, clerk.

210 In the Supreme Court of the Territory of Arizona, of the July Adjourned Term.

ADOLPH COHN, Plaintiff and Appellant,
vs.
A. J. MEHAN ET AL., Defendant- and Appellees.

Petition for Rehearing.

Now comes Adolph Cohn, the appellant in said cause, and moves the said supreme court for a rehearing of the case. The petitioner states that James Reilly and Allen R. English, who reside in Tombstone, Cochise county, are the opposing counsel in the cause.

The petitioner states the following grounds upon which he replies in asking for a rehearing: He states that this case must rest upon two propositions, which are as follows: If Angelena Daily can be held to be the owner of the interest of the mine sued for in this

case, she must do so, either, first, by virtue of an express trust in her favor or by virtue of a resulting trust.

The only express trust which can be found anywhere in the evidence in this case must rest in the follow- facts: These mines
211 were owned by Daily, had been located by him, and stood in his name. Daily, having killed a man at Bisbee, absconded and was a refugee from justice. On his route at Pueblo, Colorado, he met an old acquaintance and friend by the name of Mehan, and he there executed and delivered to Mehan an absolute deed of bargain and sale which transferred the title absolutely to Mehan. There was no trust reserved in the deed of any kind whatever. Afterwards Mehan put the deed on record in Cochise county, when Cohen, a creditor of Mehan, levied an attachment upon Mehan's interest in these mines.

On the trial in this cause, as the record shows, Mehan was permitted to testify, over the objection of Cohn, that before the deed was made Daily said to him, in substance: I propose to deed you my mines at Bisbee. I want you to look after them and take care of them and sell and dispose of the same and take out your expenses and a good commission and turn the balance of the proceeds thereof over to my wife at Bisbee. This is the substance of the testimony upon which Angelena Daily rests her claim to this property by virtue of *a* an express trust. Here was a trust declared orally. It varied the terms of a deed absolute.

It seems to me that the authorities are overwhelming that oral proof cannot be heard to engrave an express trust on a con-
212 veyance absolute in its terms."

Perry on Trusts, vol. 1, sec. 76, and cases cited.
Rhine *vs.* Ellen, 36 Cal., 372.
Bowle *vs.* Curler, 26 Pac. Rep., 226.

The fourth section of the statute of frauds as adopted by Arizona, sec. 2030, R. S., is in these words: "Any contract for the sale of real estate for a longer term than one year shall be in writing." Now, this was a contract of sale from Daily to Mehan, it is so specified in his deed, and the term- upon which he should hold his title to this real estate by virtue of this contract are to be found either in the deed or in the verbal declarations. If they are found in the deed it was in writing and valid and was an absolute conveyance. If found in the oral declaration it was in violation of that statute and is void. While we have not adopted the seventh section of the statute of frauds, and while a trust may possibly be created by parole, certainly a contract for the sale of real estate must be in writing, and an express trust cannot be proved by parole to vary a writing. This latter rule of evidence absolutely excludes the idea of an express trust in this case, hence there was an absolute sale to Mehan and he became the owner of the property. Our recording statutes confirm this view. The deed was put upon record. It was absolute. Cohn saw the record and levied upon the property
213 conveyed as the property of Mehan. Nothing can be drawn by way of notice of Mrs. Daily's claim from the fact that she

still occupied the dwelling-house on the Washington claim. She and Daily had lived in that house together for several years ostensibly as husband and wife. Such occupancy was notice to the world while Daily was there that Daily claimed to own the property. She remained there thereafter, occupying the house, and hence her occupancy was a continuance of the notice of Daily's claim so far as the same could be drawn from occupation. That notice was distroyed by the absolute deed to Mehan and the recording of the same. Hence we conclude that there is no express trust in this case, no evidence upon which one can be based, and the idea of an express trust must be discarded. To hold otherwise is to put title to real estate in this Territory at the mercy of oral testimony. This would be a most serious disaster. It would shake the credit of the Territory.

II.

The evidence is less clear as tending to show a resulting trust. On this point the evidence is as follows:

Angelena Daily swears that she never was actually married to Daily, but that some five years before Daily absconded she went to live with him as his wife and they moved down to the Washington claim which had before that been located by Daily. The
214 Irish Mag claim was near by and before that time had been located by Daily and another. She says that at that time she had three thousand dollars in cash; that during the five years that she and Daily lived together Daily did not earn or receive a dollar in cash, but spent his time living with her off of her money. She says that her money supplied the provisions and clothing and all their wants; this would be about $600 per year. The claims that he owned at the time they commenced living together were on record as having been located by him. He afterwards located claims and filed the notice of location of record as having been located by him and in his own name. The evidence does not trace her money into any one of these claims. It is upon this evidence that the court below held that these claims belonged to her by virtue of a resulting trust. The books may be searched in vain for a case where a resulting trust has been declared upon such evidence. It falls short of every principle by which a resulting trust can be founded.

The title to these mining claims is based upon the act of Congress which authorizes a citizen of the United States to acquire the right to work upon the mineral lands of the United States, and to extract ores of precious metals therefrom, and to maintain this right by doing annually a specified amount of work. I do not say that such a title may not be the subject of a resulting trust. If two
215 men agree that one shall furnish the money and — other shall search for valuable ores, and that when found they shall be the property of one or both, and the prospector should locate such claims in his own name, the courts would, no doubt, hold that he held the title in trust according to the terms upon which the money was advanced.

But such a trust could not be raised by implication from the fact alone that one man furnish- the money and supplies to the prospector. That would be a mere debt which could be enforced by proper procedure.

I again bring these matters before the court for consideration in the confident belief that the court, upon review of the evidence in this case, will see clearly that there is no evidence to sustain an express trust, and that the facts do not make a resulting trust. Unless one of these two conclusions are reached, the judgment below cannot be sustained. The court below held that there was no express trust proven, but held the evidence established a resulting trust, and that is the evidence I ask the court to review. The question is not whether this woman "ought to have this property" or not. Her rights in the property must be measured by law. Her admitted meretricious relations with Daily and their delightful five years' lounging off of her money in the house on the Washington
216 claim will certainly arouse no sympathy in her favor. With the confident belief that the court will find its duty to be to review this evidence and the briefs of counsel and the authorities cited, I submit this motion.

Very respectfully,

—— ——,

Counsel for Cohn, the Appellant.

(Endorsed:) No. 390. Cohn *vs.* Mehan. Petition for rehearing. Filed July 23, 1895. J. L. B. Alexander. Barnes & Martin, M. A. Smith, for ap'l't.

In the Supreme Court in and for the Territory of Arizona, of the July Adjourned Term, A. D. 1895.

Know all men by these presents that Adolph Cohn, as principal, and William H. Barnes, M. Asher, and M. Wormser, as sureties, are held and firmly bound unto Angelina Daily and A. J. Mehan in the penal sum of one thousand dollars, lawful money of the United States, jointly and severally well and truly to be paid by us, our heirs, administrators, and assigns.

In witness whereof we hereunto set our hands and seal- this 29th day of July, A. D. 1895.

217 The condition of the above obligation is such that whereas, in a certain cause in the supreme court of the Territory of Arizona, wherein Adolph Cohn was plaintiff and Angelina Daily and A. J. Mehan were appellees, a judgment was rendered affirming the judgment of the district court of the Territory of Arizona in and for the county of Cochise and for costs, which said judgment was rendered on the — day of July, A. D. 1895; and whereas the said Adolph Cohn has prayed an appeal from the judgment and decree of the said supreme court of Arizona to the Supreme Court of the United States; and whereas the said court has allowed the appeal upon said Cohn entering into bond, conditioned according to law, in the penal sum of one thousand dollars:

Now, if the said Cohn shall prosecute his said appeal with effect

and shall pay or cause to be paid whatever judgment or decree may be rendered by the said Supreme Court of the United States against him, and shall perform and execute the judgment and decree of the said supreme court of Arizona, if the same shall be affirmed by the Supreme Court of the United States, then this bond shall be void; otherwise in full force and effect.

WILLIAM H. BARNES. [SEAL.]
M. ASHER. [SEAL.]

ADOLPH COHN. [SEAL.]
M. WORMSER. [SEAL.]

218 TERRITORY OF ARIZONA, } ss:
County of Pima, }

William H. Barnes, being first duly sworn, on oath states that he is worth the sum of one thousand dollars, that being the full penalty of said bond over and above all his just debts — liabilities, exclusive of property exempt from execution; that he is a resident householder of the city of Tucson, Arizona.

WILLIAM H. BARNES.

Subscribed and sworn to before me this 29th day of July, A. D. 1895.

JOS. C. PERRY,
Notary Public, Pima Co., A. T.

[Seal of J. C. Perry.]

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

M. Asher and M. Wormser, both resident householders of the city of Phœnix, county of Maricopa, Territory of Arizona, being first duly sworn, each for himself says that he is worth the sum of one thousand dollars, that being the full penalty of said bond over and above all his just debts and liabilities, exclusive of property exempt from execution.

M. ASHER.
M. WORMSER.

219 Subscribed and sworn to before me this 30th day of July, A. D. 1895.

[SEAL.] BRUCE PERLEY,
Notary Public in and for Maricopa Co.

(Endorsed:) Approved this 27th day of February, 1897. Owen T. Rouse, associate justice. Filed Feb'ry 27th, 1897. J. L. B. Alexander, clerk. No. 390. In the supreme court, Territory of Arizona. Adolph Cohn, appellant, *vs.* A. J. Mehan *et al.*, appellee-. Appellant'-bond on appe*la* to U. S. Sup. Court. The sureties on the within bond on appeal are hereby approved by me this 31st day of July, A. D. 1895. J. L. B. Alexander, clerk. Lodged with me this 31st day of July, 1895. J. L. B. Alexander, clerk.

Be it further remembered that on the 31st day of July, 1895, the same being one of the judicial days of the July term, 1895, of the supreme court of Arizona, the following proceedings were had in said cause in said court, to wit:

220 In this cause the motion of appellant herein for rehearing filed herein having been fully considered by the court and the court being fully advised in the premises, it is ordered that said motion be, and the same is hereby, granted, and that the judgment of the lower court in this cause be, and the same is hereby, reversed and cause remanded for new trial in the court below, and it is ordered, adjudged, and decreed that the appellant herein do have and recover of and from the appellees herein his costs incurred in this cause in the lower court and the sum of forty-eight and $\frac{50}{100}$ dollars, his costs in this court.

In the Supreme Court of the Territory of Arizona.

ADOLPH COHN, Plaintiff and Appellant,
vs.
A. J. MEHAN and ANGELA DIAS & AL.

Now comes defendant and appellee Angela Dias and moves this hon. court to set aside and annull the order and judgment

221 made and entered in this cause in this court on the 31st day of July, 1895, reversing the former judgment of this court made *made* and entered on the 13th day of July, 1895, on the following grounds, to wit:

1st. That said order and judgment of July 31st was made inadvertently, unadvisedly, and without authority of law—

In this, that after the judgment of this court was made on July 13th, 1895, affirming the judgment of the lower court, counsel for appellant, Adolph Cohn, on the 15th day of July, 1895, in open court, prayed an appeal from said judgment to the Supreme Court of the United States, which was granted by the court, and the appeal bond fixed at $1,000.00, to be approved by the clerk of this court.

That thereafter, on the 23rd day of July, 1895, the attorneys for said appellant, Adolph Cohn, filed in this court a motion for a rehearing of said cause, and on this motion the order and judgement of July 31st was made and entered, without service of said motion or any notice thereof to said Angela Dias or her attorneys, as required by paragraph 956 of the Revised Statutes of Arizona, and the said order and judgment of July 31st, 1895, was made in less than ten days after said motion was filed, contrary to the provisions of paragraph 958 of the Revised Statutes of Arizona.

222 JAMES REILLY,
Attorney for Angela Dias.

ALLEN R. ENGLISH, *Of Counsel.*

To William H. Barnes and M. A. Smith, Esqra., attorneys for appellant, Adolph Cohn:

Please take notice that we will bring the foregoing motion to a hearing in the above-named hon. court on Monday, August 5th, at

10 o'clock a. m., in the court-room of said court, at Prescott, Arizona, if the present term of said court shall last so long, and if not, then said motion will be brought to a hearing at the opening hour of the first day of the next adjourned or regular term of said court. Said motion will be made on the records in the case.

JAMES REILLY,
Attorney for Appellee.

ALLEN R. ENGLISH, *Of Counsel.*

(Endorsed:) No. 390. Cohn *vs.* Mehan *et al.* Motion of appellee to set aside order reversing cause. Service accepted and copy received this Aug. 2, 1895. M. A. Smith, attorney for appellant. Filed Aug. 5, 1895. J. L. B. Alexander, clerk.

223 In the Supreme Court of the Territory of Arizona.

ADOLPH COHN, Plaintiff and Appellant,
vs.
A. J. MEHAN & AL. and ANGELA DIAS, Appellee.

Now comes Angela Dias, appellee above named, by her attorneys, James Reilly and A. R. English, and moves the above-named hon. court for a rehearing of the above-entitled cause on the following grounds, to wit:

That the judgment made and entered in the records of the above-named hon. court on the 31st day of July, 1895, reversing the former judgment of the same court, was without jurisdiction and void, in this:

1st. Said judgment of reversal was made on motion of appellant for a rehearing, which was not served, nor any notice thereof given to said Angela Dias or her attorneys or either of them.

2nd. Said judgment of reversal was made in less than ten days after the filing of appellant's motion for a rehearing of the case, and paragraph- 955, 956, and 958 require that service of a motion for rehearing shall be made on the adverse party or his attorney, and that the rehearing shall be had in not less than ten days after the return of service.

224 3rd. The judgment of the above hon. court, made and entered on 13th day of July, 1895, affirmed the judgment of the lower court, and appellant, Adolph Cohn, appealed therefrom to the Supreme Court of the United States and prayed the above hon. court to allow his said appeal, and the court allowed the same and fixed the appeal at $1,000.00.

The counsel for appellant Cohn are M. A. Smith and William C. Stahle, who reside in Tombstone, Cochise county, Arizona, and W. H. Barnes, who resides in Tucson, Pima county, Arizona.

JAMES REILLY,
Att'y for Appellee, Angela Dias.
A. R. ENGLISH, *Of Counsel.*

(Endorsed:) No. 390. In the supreme court of the Territory of Arizona. Adolph Cohn, plaintiff & appellant, *vs.* A. J. Mehan

& *al.* and Angela Dias, appellee. Motion for rehearing. Filed Aug. 15, 1895. J. L. B. Alexander, clerk.

225 In the Supreme Court of the Territory of Arizona.

ADOLPH COHN, Appellant,
vs.
A. J. MEHAN ET AL., Appellee.

SIRS: You will take notice that upon the argument of the motion filed and served herein to set aside and annul the order and judgment made and entered in this cause on the 31st day of July, 1895, appellee will present and read the affidavit of J. L. B. Alexander, clerk of the supreme court, which has been duly filed herein, and copy of which is hereto annexed and herewith served upon you.

Dated January 11th, 1896.

JAMES REILLY,
Attorney for Appellee.
ALLEN R. ENGLISH, *Of Counsel.*

To W. H. Barnes, J. H. Martin, M. A. Smith, W. C. Staehle, of counsel for appellant.

226 In the Supreme Court of the Territory of Arizona.

ADOLPH COHN, Appellant,
vs.
A. J. MEHAN ET AL., Appellee.

TERRITORY OF ARIZONA, } *ss:*
County of Maricopa, }

J. L. B. Alexander, being duly sworn, deposes and says that he is clerk of the supreme court of the Territory of Arizona, and during the times herein referred to was such clerk; that heretofore, to wit, on the 31st day of July, 1895, appellant's "bond on appeal to the U. S. Supreme Court" was filed in the above cause in said supreme court of the Territory of Arizona by deponent as such clerk at the request of appellant; that the sureties upon said bond were, pursuant to an order made by said court in said cause and duly filed therein, duly approved by deponent as to their sufficiency; that said approval was duly endorsed upon said bond by deponent, and said bond on appeal was thereupon filed in said cause early on the morning of said 31st day of July, 1895, and before the coming in of the court on said day, and before the rendering of any
227 decision by said supreme court of the Territory of Arizona granting a rehearing of said cause, and before any decision or order of said court was made or rendered reversing the judgment of the district court in said cause.

J. L. B. ALEXANDER.

Sworn to and subscribed before me this 13th day of January, 1896.

J. E. WALKER,
[SEAL.] *Clerk District Court.*

(Endorsed:) In the supreme court of the Territory of Arizona. Adolph Cohn, appellant, *vs.* A. J. Mehan, appellee. Notice of presentation and reading affidavit of J. L. B. Alexander, on argument of motion to set aside and annul judgment and affidavit. Filed Jan'y 13, 1896. J. L. B. Alexander, clerk.

228 Be it further remembered that on the 13th day of January, 1896, the same being one of the days of the January term, 1896, of the supreme court of Arizona, the following proceedings were had in said cause in said court, to wit:

On motion of Mr. James Reilly, counsel for appellees, it is ordered that Mr. Wm. Herring be entered associate counsel for appellee in case No. 390, and that appellees have leave to file briefs in said cause, and cause is passed temporarily.

Be it further remembered that on the 20th day of January, 1896, the same being one of the days of the January term, 1896, of the supreme court of Arizona, the following proceedings were had in said cause in said court, to wit:

In this cause it is ordered that the hearing be set for January 22, 1896, at 10 o'clock a. m., on the motions herein filed.

In the Supreme Court of the Territory of Arizona.

ADOLPH COHN, Appellant,
vs.
A. J. MEHAN ET ALS., Appellees.

229 To A. J. Mehan *et als.*, appellees, and to James Reilly and William Herring, attorneys for appellees:

You will please take notice that upon the incoming of court this day, or upon the call of the above-entitled cause, the appellant, by Barnes & Martin and M. A. Smith, his attorneys, will ask leave of court to file the motion attached hereto.

Dated January 22nd, 1896.

BARNES & MARTIN,
M. A. SMITH,
Attorneys for Appellant.

In the Supreme Court of the Territory of Arizona.

ADOLPH COHN, Appellant,
vs.
A. J. MEHAN ET ALS., Appellees.

Now comes Adolph Cohn, appellant herein, by Barnes & Martin and M. A. Smith, his attorneys, and moves the court to strike out a certain affidavit made by one J. L. B. Alexander and filed herein

on behalf of appellees on the 13th day of January, 1896, on
230 the ground that the bond on appeal mentioned in said affi-
davit is among the files of said cause in this court, and is therefore the best evidence of its recitals and of the endorsements thereon.

BARNES & MARTIN,
M. A. SMITH,
Attorneys for Appellant.

(Endorsed:) No. 390. In the supreme court, Territory of Arizona. Adolph Cohn, appellee, *vs.* A. J. Mehan, appellant. Motion to strike out. Service by copy acknowledged this 22nd day of January, 1896. James Reilly, att'y for appellee. Filed January 22nd, 1896. J. L. B. Alexander, clerk.

In the Supreme Court of the Territory of Arizona.

ADOLPH COHN, Plaintiff and Appellant,
vs.
A. J. MEHAN ET AL. and ANGELA DIAS, Defendants and Appellees.

And now comes the plaintiff, Adolph Cohn, and responds to the motion to set aside the order reversing the case, and
231 says:

That the said court at this term of the court has no jurisdiction over the records of the last term of the supreme court of this Territory.

It is familiar doctrine that every court has absolute control over its records and its proceedings during the term, and not after the term has adjourned, and during the term has the right to amend, set aside, or annul all orders or decrees made in a case. This is an inherent power which cannot be abridged, taken away, or lost by any act of either party. A party taking steps to perfect an appeal does not take away the power of the court over the case during the term.

In contemplation of law a term of court is one day.

It is hardly necessary to cite authorities for a proposition so familiar. The law and cases cited will be found in vol. 12, Encyc. of Law, page 90, and vol. 25, Encyc. of Law, page 120. I will cite two cases:

Manchester *vs.* Herrington, 78 N. Y., 194.
Cheniquary *vs.* People, 78 Ills., 570.
Barrell *vs.* Tilton, 119 U. S., 637.

Every court *a fortiori*, a court of last resort, has the right and the power, and, more, it is its duty, at any time during the term, if it finds it has made a wrong decision, to make a new and cor-
232 rect one. The records of this case show that it has been before this court for a long time. It was submitted to the court on briefs and argument. A rehearing was granted and again submitted to the court on briefs and argument. During the last

term of the court the court announced that it had reached the conclusion to affirm the decision. Appellant filed a motion for a rehearing. It was done during the term, and my recollection is the filing of the motion was announced in open court in presence of Mr. Reilly, attorney for appellees. It is possible I am mistaken in this. The court took a recess until July and then convened again in the same term of court. Just what the order made was I do not know, as I have not the records before me. If I recollect the announcement from the bench correctly, it was stated that the court had concluded to grant a rehearing and stated that, as the cause had been submitted to the court, the court had again considered the case and had reached a conclusion to reverse and remand the case for trial. In my view of it the motion for rehearing cuts no figure in this matter at all. As said before, the court had power during the term to set aside the order of affirmance and to order that the cause be reversed. It was the duty of the court to do so if the court came to
233 the conclusion that that was a proper judgment in the case, and when that term adjourned the court had no longer power over the case, as by the adjournment of the term the case had got beyond the jurisdiction of the court.

The only power otherwise after the term is the power granted by statute secs. 954–958 to consider and pass upon a motion for a rehearing at the next term of the court. The appellees' motion filed on the 15th day of August, 1895, while it purports to be a motion for a rehearing, is not a motion for a rehearing in any sense.

It does not state the grounds on which the party relys; it does not point out to the court any error made in its decision; offers no ground or reason why the cause should not be reversed and remanded, but it simply points out that the motion for rehearing was heard prematurely, and argues that the court had no power then to grant a rehearing; hence this motion ought not to be considered as a motion for a rehearing.

It seeks to attack the power of the court to set aside its order, and we have shown above that the court had the power during the term to set aside the order of affirmance and to make an order of reversal.

Neither the appellee nor his attorney has filed, as we are advised, any affidavit or evidence to show that the motion for rehearing was
234 not served upon the attorney for appellee. Whether the record is silent upon that point I do not know, but I do know that a copy of the motion for a rehearing was mailed to James Reilly, attorney for appellee, long before the order was made in July, and I also know that a copy of it was lying on his table in his office in Tombstone. I admit this is outside the record, but counsel should not be permitted to deny the service of a motion for a rehearing without offering the affidavit of somebody denying that they had notice of the motion. While the statute in secs. 955, 956 point out how a motion for a rehearing may be served, if there be actual service that particular method is not necessary. If the motion is made in open court in presence of counsel of the opposite side, counsel is charged with the knowledge of the procedure in open court. If service be made by mailing a copy and

he receives it, that would be clearly good service. If a copy of the motion be handed to the party or his attorney, that would be clearly good service, and a party who says he has not been served should show it by affidavit.

But without regard to any motion for a rehearing and outside of it all, the case has been submitted during the term by the parties upon their briefs on file. The case was in the hands of the court; the court had complete power over it, did not lose power over it when it made an order affirming the judgment, and any time
235 during the term, with or without a motion for rehearing on file, it had the power to set aside the order and make a different judgment. The statute as to rehearing extends that power over to the next term of the court if it provisions be complied with.

The above is just what the court did in this case; it had the right and power to do it; its jurisdiction was not lost and this particular motion, whatever it may be, should be denied upon the grounds stated.

Respectfully submitted.

WM. H. BARNES,
Attorney for Appellant.

(Endorsed:) 390. In the supreme court, Territory of Arizona. Adolph Cohn *vs.* A. J. Mehan *et al.* Reply to motions of appellee for rehearing. Filed Jan'y 22, 1896. J. L. B. Alexander, clerk.

Be it further remembered that on the 3rd day of February, 1896, the same being one of the days of the judicial days of the January term, 1896, of the supreme court of Arizona, the following proceedings were had in said cause in said court, to wit:

236 In the cause the motion to set aside the judgment of this court was taken up and was argued by Mr. Wm. Herring, for appellees, and by Wm. H. Barnes and M. A. Smith, for appellant, and cause was submitted; whereupon it is ordered that the motion to set aside judgment be denied and motion for rehearing herein be granted and cause be set for hearing on February 7th, 1896, at 2 o'clock p. m.

Be it further remembered that on the 11th day of February, 1896, the same being one of the days of the judicial days of the January term, 1896, of the supreme court of Arizona, the following proceedings were had in said cause in said court, to wit:

This cause came on for hearing and was argued by Mr. W. H. Barnes, for appellant, and by Mr. Reilly, for appellees; and ordered that further argument be continued till tomorrow morning, February 12th, 1896.

Be it further remembered that on the 12th day of February, the same being one of the judicial days of the January term, 1896, of the supreme court of Arizona, the following proceedings were had in said cause in said court, to wit:

Argument in this cause was resumed by Wm. Herring, for

appellees, and further argument ordered continued in the cause till tomorrow morning.

237 Be it further remembered that on the 13th day of February, 1896, the same being one of the judicial days of the January term, 1896, of the supreme court of Arizona, the following proceedings were had in said cause in said court, to wit:

The argument in this cause was resumed by Mr. Wm. Herring, for appellees, was concluded by Mr. M. A. Smith, for appellant; whereupon it was ordered that appellees have five days to file brief herein and appellant have — days thereafter to reply, and cause be then submitted on such briefs.

Be it further remembered that on the 2nd day of October, 1896, the same being one of the judicial days of the October term, 1896, of the supreme court of Arizona, the following proceedings were had in said cause in said court, to wit:

In this cause the motion of appellees herein to set aside the order and judgment of this court, made and entered herein on the 31st day of July, 1895, reversing the judgment of the lower court in this cause, having been argued by counsel for appellant and appellees respectively and duly submitted and by the court taken under consideration, and the court having fully considered the same and being fully advised in the premises, it is ordered that said

238 motion be, and the same is hereby, sustained, and the order granting appellant's motion for rehearing proceeding said judgment of July 31st, 1895, and the said judgment of July 31st, 1895, in this cause be, and the same is hereby, set aside and annulled, and the said motion for rehearing is denied, and the judgment of this court of July 10th, 1895, is hereby reinstated and confirmed in this cause.

And be it further remembered that on the 24th day of February, 1897, the same being one of the judicial days of the January term, 1897, of the supreme court of Arizona, the following proceedings were had in said cause in said court, to wit:

In this cause Mr. Wm. H. Barnes, for appellant, moved the court for an allowance of an appeal to the Supreme Court of the United States, and also that findings be made and filed by the court in this cause; whereupon it is ordered by the court that appellant herein he granted an appeal to the Supreme Court of the United States upon filing a cost bond in the sum of one thousand dollars, as heretofore ordered, and that the motion of appellant for findings be submitted.

239 In the Supreme Court of the Territory of Arizona.

ADOLPH COHN, Appellant,
vs.
A. J. MEHAN ET AL., Appellees.

And now comes Adolph Cohen, the appellant, by William H. Barnes, his attorney, considering himself aggrieved by the judgment affirming said cause, and here, in open court, prays the court

for an appeal of said cause to the Supreme Court of the United States.

He shows by the affidavit of William H. Barnes and Andrew P. Payeken that the amount in controversy in this cause, exclusive of costs, is over $5,000, viz., $20,000, and he therefore asks that the appeal be allowed upon his executing bonds on appeal, conditioned according to law, in such sum as the court may fix, the same to be filed within such time as the court may order and the same to be approved by the clerk of this court, and he prays that a transcript of the record upon said order or judgment of affirmance made and duly authenticated may be sent to the Supreme Court of the United States.

W. H. BARNES,

240 *Attorney for Adolph Cohn, Appellant.*

And now, on this 27 day of February, A. D. 1897, this day being one of the days of the January, 1897, adjourned term of said court, and it appearing to the court that the said application and offer of bond is in due form and proper, it is here, in open court, ordered that the appeal be allowed as prayed for upon appellant, Adolph Cohn, giving bond on appeal, according to law, in the penal sum of $1,000.00, the sureties to be approved by the clerk of this court.

A. C. BAKER,
Chief Justice.
JNO. J. HAWKINS, *A. J.*
OWEN T. ROUSE.

(Endorsed:) No. 390. In the supreme court, Territory of Arizona. A. Cohn, appellant, *vs.* A. J. Mehan, appellees. Notice of appeal and allowance thereof to U. S. Supreme Court. Filed Feb'y 27, 1897. J. L. B. Alexander, clerk.

241 In the Supreme Court of the United States.

ADOLPH COHN, Appellant,
vs.
A. J. MEHAN and ANGELA DIAZ DE DALEY, Defendant- and Appellees.

And now comes the appellant, Adolph Cohn, and alleges that there is manifest error in the record and proceedings in said cause in the supreme court of the Territory of Arizona as follows, viz., to wit:

I.

The court erred in affirming the judgment of the district court in said cause.

II.

The court erred in not reversing the case upon the errors assigned to the record and proceedings in the district court in said cause.

III.

The court erred in that it did not reverse the case and direct the court below to render judgment in favor of plaintiff.

242 IV.

The court erred in that it did not reverse the case and direct the court below to render motion for a new trial.

V.

The court erred in that it did not reverse the case on the ground that the evidence did not sustain the judgment, and for that reason to set aside the judgment below.

VI.

The court erred in that it did not direct the court below to render the judgment for the plaintiff, as prayed for.

VII.

The court erred in holding that the evidence sustained the resulting trust in favor of Mrs. Daley, appellee.

VIII.

The court erred in holding that under the evidence there was an express trust in her favor proven by parol varying a deed absolute.

IX.

The court erred in not sustaining the various assignments of error to the record of the trial court.

Appellant therefore prays that the judgment of said
243 supreme court be reversed with such direction as the court may determine in the premises.

By W. S. BARNES,
Att'y for Appellant.

(Endorsed:) No. 390. Cohn *vs.* Daily. Assignment of errors. Filed March 18, 1897. J. L. B. Alexander, clerk.

244 UNITED STATES OF AMERICA, } ss:
Territory of Arizona, }

J. L. B. Alexander, being first duly sworn, on oath says that he is the duly appointed, qualified, and acting clerk of the supreme court of the Territory of Arizona, and that he has been such clerk since the 9th day of January, A. D. 1894; that on the 12th day of April, A. D. 1897, the citation in the case of Adolph Cohn, appellant, against A. J. Mehan, Dewit C. Turner, Bell H. Chandler, C. F. Fisher, and Angela Dias de Daley, appellees, pending in the said supreme court of Arizona and on appeal to the United States Supreme Court, was

lodged in the office of the clerk of said supreme court of Arizona Territory, which citation was issued by Hon. A. C. Baker, chief justice of Arizona Territory, on or about the 9th day of April, A. D. 1897, in due form of law and made returnable within sixty days from date thereof, and that said citation had an acknowledgment of service endorsed thereon by Mr. William Herring, one of the attorneys of record for said appellees in said supreme court of Arizona Territory; thatt hereafter, on the 28th day of May, A. D. 1897, the records of said supreme court of Arizona were moved, *from* by order of the Attorney General of the United States, from the Fleming block to the county court-house, in the city of Phœnix, Arizona, and
245 that during the moving of the same the said citation was lost or misplaced, which was among the papers and records so moved, and affiant is now unable to find and produce the said citation, and for said reason does not transmit the same with the transcript to the record in said cause to the United States Supreme Court.

J. L. B. ALEXANDER.

Subscribed and sworn to before me this 28th day of June, A. D. 1897.

[Seal United States District Court, Third District, Arizona.]

J. E. WALKER,
Clerk of the District Court of the Third Judicial District of the Territory of Arizona.

246 In the Supreme Court of the United States.

ADOLPH COHN, Appellant,
vs.
ANGELINA DAILY, Appellee.

For good cause shown to the undersigned, chief justice of the supreme court of the Territory of Arizona, the judge who signed the citation in this case hereby enlarges the time when the record of said cause be filed and the cause docketed to the 13th day of July, A. D. 1897.

A. C. BAKER,
Chief Justice of the Territory of Arizona.

[Endorsed:] Lodged June 9th, 1897. J. L. B. Alexander, clerk.

Endorsed on cover: Case No. 16,629. Arizona Territory supreme court. Term No., 136. Adolph Cohn, appellant, *vs.* Angelina Daily and A. J. Mehan. Filed July 14th, 1897.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 136.

ADOLPH COHN, APPELLANT,

vs.

ANGELINA DAILY ET AL.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from a judgment of the supreme court of Arizona affirming a judgment of the district court of said Territory in and for the county of Cochise, confirming in the appellee title to certain mining claims, the value of which is over five thousand dollars (Trans., pp. 106, 107), which said appeal was duly allowed (Trans., p. 120).

In the years 1886 and 1889, inclusive, one James Daily located, under the mining laws of the United States, the mining claims, title to which are in controversy in this action. Within the years stated, or at some time within said

dates, he was living with a woman born in Hermosillo, Mexico, whose name, as the transcript shows, was Angela Dias.

James Daily left the jurisdiction of the court about the 11th day of April, 1890, being a fugitive from justice, having killed a man by the name of Lowther, at the town of Bisbee, Arizona, on the date above mentioned. In Colorado he met an acquaintance, from Arizona, by the name of A. J. Mehan, one of the parties to this action, and transferred by deed, absolute, to Mehan the property described in the complaint. Mehan was at this time indebted to the plaintiff Cohn, the appellant here, and when the deed from Daily to Mehan was recorded the appellant Cohn caused by proper suit an attachment to be levied on the property conveyed by such deed. The appellant claims title to the property in controversy by virtue of that attachment merged into a judgment, which judgment was the basis of a judicial sale and a deed (after expiration of the time for redemption) to the plaintiff Cohn, he having been the purchaser at such sale. At the time of the levy of the attachment and at the time of the sale under the judgment and up to the time of the deed by the officer of the court to Cohn, A. J. Mehan, the defendant in the judgment, was the holder of the legal title to the mines sued for by virtue of a deed from Daily to him, which deed was executed by Daily before any liens had attached and before any suit affecting the property had been brought or *lis pendens* filed. Daily acquired title by location, notices of which are in evidence (Trans., pp. 20–29, inclusive).

The defendant Mrs. Daily seeks to defeat the effect of this deed to Cohn by setting up that she was the equitable owner of the mining claims deeded by Daily to Mehan.

Mehan, after the levy of the attachment by Cohn, transferred the claims in controversy or certain interests therein to Turner, Chandler, and Fisher, residents of the State of

Colorado, and hence those three persons are made parties defendant in the present case (Trans., p. 8).

There was no opinion filed by the court in this case, nor does the record show on what grounds the judgment was based. The record does show, however, that the court decided the case first in favor of appellees, then in favor of appellant, and then again for appellees, which last judgment, it is contended, was without authority (Trans., pp. 116, 117, 118).

ASSIGNMENT OF ERRORS.

And now comes the appellant, Adolph Cohn, and alleges that there is manifest error in the record and proceedings in said cause in the supreme court of the Territory of Arizona as follows, viz., to wit:

I.

The court erred in affirming the judgment of the district court in said cause.

II.

The court erred in not reversing the case upon the errors assigned to the record and proceedings in the district court in said cause.

III.

The court erred in that it did not reverse the case and direct the court below to render judgment in favor of plaintiff.

IV.

The court erred in that it did not reverse the case and direct the court below to render motion for a new trial.

V.

The court erred in that it did not reverse the case on the ground that the evidence did not sustain the judgment, and for that reason to set aside the judgment below.

VI.

The court erred in that it did not direct the court below to render the judgment for the plaintiff, as prayed for.

VII.

The court erred in holding that the evidence sustained the resulting trust in favor of Mrs. Daley, appellee.

VIII.

The court erred in holding that under the evidence there was an express trust in her favor proven by parol varying a deed absolute.

IX.

The court erred in not sustaining the various assignments of error to the record of the trial court.

Appellant therefore prays that the judgment of said supreme court be reversed with such direction as the court may determine in the premises.

The assignment of errors from the trial court to the supreme court of Arizona are printed on page 88 of the Transcript, and are here inserted.

1st. The court erred in admitting in evidence the deposition of A. J. Mehan; which deposition is irrelevant to any issue in the pleadings and should have been excluded because it contained statements invalidating his title and is otherwise irrelevant and incompetent (Rec., p. 48).

2d. The court erred in refusing to allow testimony contradicting statements in Mehan's deposition (Broad's testimony, Rec., p. 71).

3d. The court erred in refusing to permit the evidence of defendant Mrs. Daley, given before the coroner's jury in the inquest held on the body of one Lowther, which testimony tended to show she was never married to Daley, and on the further ground that the said testimony given by her before the coroner tended to contradict the statements made by her on the trial of this cause (Trans., p. 73).

4th. The court erred generally in admitting improper evidence and in refusing to admit competent evidence; to which ruling exception was taken at the time.

5th. The judgment should be set aside and a new trial granted because not sustained by evidence, in that—

(*a.*) The evidence does not support judgment, because there is no evidence showing any facts which in law creates a resulting trust in favor of the defendant Mrs. Daley.

(*b.*) The evidence fails to show that plaintiff had any actual or constructive notice of any equities in the defendant Mrs. Daley at the time of the attachment by plaintiff Cohn or at the time of the purchase of the property by him.

(*c.*) The evidence, on the contrary, shows that plaintiff was an innocent purchaser for a valuable consideration without notice.

(*d.*) The evidence shows that any money advanced by Mrs. Daley was a loan, and no trust could result in her favor.

(*e.*) The testimony of Mrs. Daley shows at best that it was community property and not separate estate.

(*f.*) There is no testimony tracing the money claimed by Mrs. Daley's attorney as her separate property into any particular piece of property in controversy in this suit.

(*g.*) Mrs. Daley's evidence shows that she and Daley located the property after marriage, and such act made the

property community property, subject to *any* disposal of the husband. (See Trans., p. 54.)

(*h.*) The evidence shows that all money expended by Mrs. Daley was for support of the family and for assessment-work on the mines, no trust resulting. (See Trans., p. 54.)

6th. The court erred in admitting in evidence the record in the divorce suit of Daley *vs.* Daley.

7th. The court erred in admitting in evidence the record in Daley *vs.* Daley *et al.*, the plaintiff in this cause not being bound by it, being no party to it.

8th. The court erred in refusing to permit plaintiff to show that Mr. and Mrs. Daley were not husband and wife at the time of the location of the claims in controversy.

9th. The court erred in admitting in evidence the *lis pendens* filed by Mrs. Daley after Cohn's attachment and lien in a suit to which Cohn was not a party.

10th. The judgment is not supported by the evidence, in that—

(*a.*) Mehan's testimony is irrelevant and incompetent.

(*b.*) Even if relevant it was broken down by testimony as to his reputation for truth and by proof of contradictory statements made elsewhere.

(*c.*) The burden of proof being on defendants to show a trust in favor of Mrs. Daley, there is no evidence in the record tending to show facts from which any trust could result.

11th. The evidence shows that plaintiff Cohn was, at the time of filing his suit, the owner of the property described in the complaint.

12th. The court erred in overruling the motion for new trial (Trans., pp. 16–18).

ARGUMENT.

In order to a clear understanding of the foregoing assignment of errors, it is necessary to give in chronological order the various suits brought in efforts to extinguish the title held by Mehan and the history of those suits, and then examine the facts surrounding them, from which we hope to show that Cohn at the time he brought this suit was and now is the owner of the mining claims in controversy herein.

The record partly shows, and would if we had been permitted have fully shown, the following original facts:

One James Daley located between the years 1885 and 1889 the properties described in the complaint. On April 11, 1890, he killed a man by the name of Lowther and fled the country, since which time he has never been within the jurisdiction of the court. While such fugitive from justice he by deed, absolute and unconditional, transferred the property to A. J. Mehan, whom he met in Colorado. Mehan at the time was indebted to the plaintiff below, the appellant here, Cohn, who when the deed was recorded in the proper office in Cochise county, Arizona, brought suit against Mehan, and caused on the 13th day of September, 1890, an attachment to issue, which on the same day was levied on the property in controversy and filed with the county recorder, and under the Arizona statute became a lien on the property from the date of levy and filing.

On October 15, 1890, Angela Diaz, who had been living and cohabiting with Daley, brought a suit against him to have a marriage declared, and in the same suit to obtain a divorce and a decree giving her HALF the property.

On May 14, 1891, judgment was rendered in accordance with the prayer (Trans., p. 43).

On October 18, 1890, Mrs. Daley brought suit against

Mehan and others to whom Mehan had transferred interests in the claims, and filed a *lis pendens*. In this suit the complaint charges that Daley never executed the deed to Mehan. That complaint set up no declaration of a trust at all. Long after filing the *lis pendens* the complaint was amended, setting up other grounds.

On May 26, 1892, judgment was rendered in the case (Trans., p. 44), long after complaint was filed by Cohn in the case at bar and not more than one or two days before the commencement of its trial in the court below.

On these facts only two questions arise for adjudication:

1st. Does any trust under the facts shown by the testimony exist in favor of appellee Angela Dias which was a charge on the deed from Daley to Mehan?

2d. Was appellant concluded by the judgment in the case of Angela Dias *vs.* A. J. Mehan *et al.*, to which Cohn was not a party?

To the first question, Does any trust result from any evidence in the case?

Her equities as she asserts them are of two kinds. She first attempts to set up a resulting trust, declaring that the mines were purchased, operated, and developed with her money, and the title ought to have been in her and was not. She utterly fails to make out a resulting trust. The only testimony on the question was given by her (Trans., p. 53). She did not furnish the money to purchase the mines, as the whole record shows they were located by Daley and no money was required or could have been used in obtaining title. Paying out money for assessment-work on a mine creates no trust in favor of the person advancing the money. Besides, if appellee and Daley were in fact husband and wife, their joint labor in protecting the title leaves the mines community property at best over the disposition of which the husband had full control. He could deed it as

he pleased; it was subject to sale for his debts. If they were not husband and wife, then by her own testimony she could claim no more than the money actually advanced in doing the assessment-work on the mine.

A resulting trust is a trust which arises by operation of law, where an agent uses the money of his principal to buy real estate and takes the title in himself. Its essence is the operation of law at the time of the purchase and acquiring title, and the title to the real estate by resulting trust is at once the equitable estate of the person in whose favor the resulting trust arises by operation of law.

Washburn Real Prop., vol. 2, 175 (7th ed., p. 447, and cases cited).

The evidence in this case shows that these people were never married, as required by the statute, but only became husband and wife by living together. The evidence is uncertain as to when this marriage relation began. The Revised Statutes, sec. 2095, provides that all persons who have heretofore lived together as husband and wife and shall continue to live together for one year from the date of the act taking effect, etc., shall be considered as legally married. The act took effect July 1, 1887. Under that statute they were not legally married until July 1, 1888. Long before that time the George Washington, Old Republican, Irish Mag, Copper Monarch, and Angel mining claims had been acquired by location, and the title to the same were in Daley. So from the evidence they were not living together at the time of the location of these claims, or, if they were, they were not married. But a resulting trust might arise just as much to a person who was not the wife as to one who was the wife, so that does not become very material.

The evidence in the case shows that when they commenced to live together she had $3,000. They lived together five years, and this $3,000 was used in building a house, which they lived in, on the George Washington claim

and in the purchase of provisions and clothing. All of the supplies for this woman and the man Daley during the five years were paid for with this money. The evidence shows during that time some work was done on these claims and the title kept up. Whether $100 worth of work was done each year or not the evidence does not disclose. Be that as it may, he continued to work upon the mines to such an extent that no one intervened by another location, and the title to the mines was retained by Daley.

She says she was present when the mines were located and held the tape-line for measurements and helped build the monuments. Such evidence as this does not make out a resulting trust.

The title to these mines was not acquired by virtue of her money; was not acquired by Daley as her agent. They were acquired by Daley as a citizen of the United States who had discovered ore and who had located the same. They were acquired under an act of Congress that gives the right to locate such claims, and no money is required to acquire such title; simply the performance of certain acts required by the statute, and these acts may be performed without expense. It is not based on a money consideration. It is a grant by Congress. Besides, the evidence shows that Mrs. Daley could not have been the owner of the mines, because under the act of Congress no one but a citizen of the United States can make a valid location of mining claims. The evidence shows she was born in a foreign country, to wit, Sonora, Mexico, and there is no evidence that she ever became naturalized by operation of law or adjudication of a court; hence she could not have owned an interest in these mining claims. It was therefore impossible for her to have had a resulting trust in these mining claims at the time of the location thereof. If her money was used in work and labor on the mines thereafter and in improving and developing the same, that cannot be the basis of a resulting trust.

Washburn, *supra*.

The inference where money is expended by people living together as husband and wife is, that property acquired is community property, and, even if a trust could be inferred between strangers, it will not in this case.

Second. She claims that there is an express trust which grows out of the facts stated in the deposition of Mehan. The deposition of Mehan in effect states that at the time Daley conveyed the legal title to him by an absolute deed that he, Daley, said he made this deed to him in order that he might hold the title and sell the mines, so that his wife could have the proceeds and the benefit of the same, he to take out his expenses in negotiating and selling the mines. This, if anything, is an express trust made by a grantor in favor of a third person, resting entirely in parol and in violation of the terms of the deed, which is absolute in form, with an addendum clause that the title should be held by Mehan for his own use and benefit.

Many cases and most of the law which was read and referred to below by counsel on the other side in argument is drawn from conceded facts. For instance, it is stated that a purchaser at a judgment sale purchases subject to existing equities, and that if an express trust existed in favor of Mrs. Daley that this trust can be asserted against a purchaser with notice. What is here meant by existing equities? If the deed from Daley to Mehan had said that Mehan was to have and to hold the said real estate for the use and benefit of Mrs. Daley, then there would have been an express trust contained in the deed, and, of course, all purchasers thereafter would have been subject to that trust. The question here is not as to the effect of a trust, if it exists, but whether there was a trust at all. We insist that an express trust, such as is sought to be asserted by the evidence of this deposition of Mehan, cannot exist in parol to vary a deed absolute in its terms. This is the exact point of the controversy.

If authorities can be found for this doctrine, we have failed to find them.

We refer to Perry on Trusts, vol. 1, sec. 76.

"Oral proof cannot be heard, to engrave an express trust on a conveyance absolute in its terms," referring to—

Kelly *vs.* Karsner, 72 Ala., 110.
Lawson *vs.* Lawson, 117 Ills., 98.
Philips *vs.* South Park Com'rs, 119 Ills., 626.
Green *vs.* Cates, 73 Mo., 122.
Hansen *vs.* Berthelson, 19 Neb., 433.
Cain *vs.* Cox, 23 W. Va., 594.
Pavey *vs.* Amer. Ins. Co., 56 Wis., 221.
Abbott's Trial Evidence, p. 238.

"But if a written agreement between the parties appears, manifesting an intent to make an absolute conveyance, parol evidence is not competent between them to prove that a trust was intended, unless fraud or mistake is shown."

The same author, referring to resulting trusts, says:

"To establish a resulting trust, it must appear that the consideration was paid at or before the time of the conveyance," referring to

St. John *vs.* Benedict, 6 Johns' Ch'y, 111.
Sturtevent *vs.* Sturtevent, 20 N. Y., 39.
Horn *vs.* Ketaltas, 46 N. Y., 605.

In Rhine *vs.* Ellen, 36 Cal., 372, it is laid down that a covenant in writing cannot be contradicted or opposed in their legal consideration by facts *aliunde*, and lays it down that an express trust cannot be asserted against a deed absolute in form.

The case cited by counsel in argument (Potter *vs.* Hyland, 27 Pac. Rep., 1108) and the case of Bowle *vs.* Curler, *ib.*, 226, which is the last case reported from California, lays down the same proposition, to wit, that where a deed is ab-

solute on its face it cannot be varied and an express trust declared against it by parol in the absence of fraud. So California, from volume 36 down to the last reported decision, stands arrayed on that side unequivocally. See also Bryson *vs.* Bryson, 17 Pac. Rep., 690, to the same effect.

Brown on the Statute of Frauds, in discussing the fourth section of the act, which applies to trusts, says that that section has been adopted in most of the States, and the only exceptions he knows of are Virginia and Kentucky. The fourth section of the statute of frauds has been adopted in most of the States and has been adopted in this Territory, and is found in section 2030 of our Revised Statutes. The language of our statute is:

"Any contract for the sale of real estate for a longer term than one year shall be in writing."

Now, if a contract be in writing and it is sought to vary that contract by parol, it would clearly be in violation of that section. It is held that section 4 is a prohibition against any contract or any trust growing out of any agreement by the parties, unless it be in writing, without regard to the seventh section.

With this fourth section in force, the only trusts which could exist by parol are trusts which arise not by contract or by agreement of parties, but by operation of law, such as resulting trusts or trusts of that character.

Courts also have power in equity to reform a contract made in writing and make it correspond to the intent of the parties by making a new contract in equity; but that is not asserting a trust. It comes under the principle of the powers of the court where, by mistake or fraud or accident, the contract does not express what was the real intent, the court may make it do so. In the case at bar there is no evidence of fraud. Mr. Daley did with Mehan just what he wanted to do, and Mr. Mehan accepted the title just as Daley wanted him to do. There was no fraud, accident, or mistake in the transaction. Mr. Daley made a deed absolute

upon its face and delivered it to Mehan. That was exactly the thing he then wanted to do. Mehan states, however, if he is to be believed, that Daley wanted him to do certain things, which Mehan might or might not do as he saw proper; but Daley cannot be heard to say against the creditors of Mehan and this judgment that Mehan did not have title. Daley is estopped by his deed and Mehan cannot be heard to deny that he owned the property which he accepted the title to, and a stranger cannot assert a trust to enforce or reform or modify a contract, nor can he assert that there was any fraud, accident, or mistake between Daley and Mehan, whose transaction was just as they wished it to be. Hence the whole question turns squarely and flatly on the question of whether under such circumstances a trust can be declared outside the terms of a deed for the benefit of a third person who was no party to it.

The doctrine under which a deed absolute is held to be a mortgage does not come within the principles of express trusts. It has grown up to be a separate equity jurisprudence and stands upon principles of its own, and is an exception to the rule. It had its origin in the equitable jurisdiction to prevent fraud by a creditor receiving a deed without having written in it a condition of defeasance. Its origin was in the domain of equity to correct fraud; and, having its origin there, it has grown into a jurisprudence of its own.

Jones on Mortgages, vol. 1, sec. 284, and sections following and cases cited.

Greenleaf on Evi., vol. 1, 266, in considering the fourth section of the statute of frauds: "The statute further requires that the declaration or creation of trusts of land shall be manifested and proved only by some writing, signed by the party creating the trust."

Gee *vs.* Thrailkill, 25 Pac., 588, is on all fours with this case, and the statutes of Kansas the same—that is, the fourth section of the statute of frauds.

Daily *vs.* Kinsler, 47 N. W., 1045, and cases cited.
Here statute is the same as ours is. Same decisions under same statute have been made in Michigan cases cited in Daily *vs.* Kinsler, and likewise in Minnesota.

The trust sought to be asserted here is a secret trust resting in parol and in conflict with the record, and it is admitted that Cohn had no actual notice of the existence of the trust. It has been asserted that he had notice of Mrs. Daley's claim, whatever it might be, by the fact that she was in possession of these mines. The evidence shows that she lived in a house which was on the George Washington claim, and hence the doctrine of her claim can apply to no other than to that claim, and we insist that her residence upon the claim does not charge Mr. Cohn with any notice of any claim on her part. She insists that she was the wife of Daley, and that she lived with Daley on this claim for five years as his wife, and that Daley ran away from said residence and she remained there. The fact that a wife lives with her husband in a house occupied by them as husband and wife can be held to give notice, not of any claim of the wife in the premises, but it would be notice that the husband had some interest in it. It can be no charge of notice of any separate claim of title from the fact that a wife lives with her husband upon and in possession of real estate, and when the husband absconds she remains in the family mansion. That notice would be to the very contrary of that claimed by counsel; it would be notice that Daley owned it, and when the record also discloses the fact that he owned it there can be no notice inferred or constructive notice drawn from the fact that she was in occupancy of the house alone after Daley went away; especially is this true where the attachment liens and all these questions arise shortly after he did abscond, only a few months having elapsed be-

fore the attachment suit was commenced. The only notice aside from that that is asserted and can be claimed by the parties is notice growing out of the *lis pendens* in the suit of Mrs. Daley *vs.* Mehan, Turner, and others.

In the first place, we assert that under the doctrine laid down by Freeman on Judgments, 4th ed., vol. 2, sec. 338, "The lien of the attachment merges into that of the judgment, and the conveyance relates back to the levy of the attachment, and transfers all the interest of the judgment debtor at that time."

And see cases cited.

67 Iowa, 106, and 10 Pa., 1.

So we are related to the levy of the attachment and are bound only by such notice as we had at that time. At the time of the levy of the attachment lien there was no constructive notice of the claim of Mrs. Daley. Shortly after, and the first constructive notice that can be charged against Cohn is the filing of the *lis pendens* in this case. *Lis pendens* only gives constructive notice of the allegations of the complaint in the suit in which the *lis pendens* is filed, to wit, the suit of Mrs. Daley *vs.* Mehan, Turner, *et al.* In the complaint in that case, which was filed at the time the *lis pendens* was filed, she did not assert a resulting trust in the mining claims she sought to recover, nor did she assert an express trust by virtue of the deed from Daley to Mehan. She asserted that her money had been used in the development of these mines to the extent of $3,000, and she was in equity entitled to $3,000, and that Daley was the owner of the value of the mines above $3,000; that was the extent of the trust she sought to establish by the suit in which the *lis pendens* was filed, and that is the trust we are charged with constructive notice of through the filing of the *lis pendens*, if anything at all. We are not charged with notice of the existence of an express trust between Daley and Mehan. This view will be verified by an inspection of the pleadings

as they existed at the time of the filing of the *lis pendens*. Being constructively charged with notice of that trust—that $3,000 of her money had gone into the development of the property, and that she was entitled to $3,000 out of these mines, and that Daley was entitled to the surplus—was an allegation of the trust which could not exist and an allegation of a trust which is not proved in this case, and hence we are charged with notice of that which the court must find from the evidence does not now exist and did not then exist.

Constructive notice can only be notice of a fact or of a claim which has a legal or an equitable basis and may be enforced. The trust, as it was alleged in that complaint, has never been enforced, is not alleged now, and is not the basis of any equity which is sought to be enforced, and we are not charged by that *lis pendens* with constructive notice of the trusts which are sought to be enforced in this case, and which are the only trusts that can defeat the claims of Cohn in these mines.

If this view be true—and it is to be determined by an inspection of these pleadings—then Cohn at the time of his purchase had no notice whatever of the existence of these secret trusts if the court holds that they existed at all.

Cohn is a judgment creditor of Mehan, and his lien attached at the time of the filing of his attachment and has existed ever since as a valid and existing lien by virtue of the registration laws and statutes as against every trust. If it shall be held that his lien only begins from the date of the filing and levying of his execution, then at that time he had no constructive notice, as is said above, of the trusts sought to be enforced in this case, and hence no constructive notice of any trust at all. He is then a creditor, and hence protected, and, as we insist, a purchaser for value without notice.

Upon this point we refer to Freeman on Judgments, 4th ed., vol. 2, sec. 366, and cases cited.

We refer particularly to the case of Halloway *vs.* Platner, 20 Iowa, 121 (89 Amer. Dec., 517), and Wood *vs.* Chapin, 13 N. Y., 509 (67 Amer. Dec., 62).

The complaint on which the *lis pendens* was filed alleges, with reference to the deed from Daley to Mehan, that the same was never made or executed by Daley and set up no declaration of trust at all. (See Trans., p. 91 *et seq.*)

An amended complaint which was filed long after the *lis pendens* was filed sets up other grounds, it is true, but the *lis pendens* cannot be invoked as constructive notice to Cohn of the allegations of the amended complaint, which are entirely different and based upon different grounds from those in the complaint on file at the time the *lis pendens* was filed.

As to the question whether a constable may levy on real estate, we refer to sections 568 and 569 of the Revised Statutes.

As to the description of the property in the constable's deed, we insist that it is a good description. The mines are described as certain mines in the Warren mining district, Cochise county, Arizona Territory, to wit, the George Washington, Irish Mag, etc., and reference is made for more certainty to the location notices on file in the recorder's office of Cochise county. We insist that this is a mere latent ambiguity. For instance, a deed in the case of Sargeant *vs.* Adams, 37 Gray, 72, conveyed "the Adams house" on Washington street, Boston, numbered 371, and it was held to be a latent ambiguity and could be shown by parol. In a case recently decided by the Supreme Court of the United States it was held that a devise of lot 3, in block 406, was a latent ambiguity, and parol evidence was admitted to show that lot 6, in block 403, was actually devised.

Patch *vs.* White, 117 U. S., 210.

A latent ambiguity may always be explained by parol.

Euliss *vs.* McAdams (N. C.), 13 S. E., 162.

Greenleaf Evi., vol. 1, sec. 297 *et seq.*

The evidence in this case on no ground can sustain any title in law or equity in Angelina Daley. She had $3,000, she says, when she married Daley. They lived together for five years, and she says that during that time Daley had no income, and that they lived off this money. That would be no more than $600 per year to board, feed, and clothe them.

Besides, she alleges in her complaint, page 91, Transcript, that she built a residence and improved a garden out of this same wide-reaching $3,000.

To say that mining claims acquired by him during that time by discovery and location and kept by his work are hers is absurd. They, if acquired after marriage, would be community property and his deed would convey them. This is conceding all she claims. If she is not his wife, then her claim is less equitable. She might possibly be held to be a creditor of Daley. Even to make her a creditor the evidence falls short. *She paid out the money willingly, under no contract, and shared with him the consumption of the same.* There is no implied contract in those facts.

The evidence falls short in tracing her money into any particular piece of the real property. The Irish Mag claim was located January 1, 1886, and the George Washington January 1, 1887. This was before they had become husband and wife, conceding all she claims, and the Irish Mag before they lived together at all. Her money cannot be traced into these. Hence, there can be no trust as to them. It is no better as to the others, as she says herself they lived up the money for board and clothes.

Again, her bill for divorce and her suit against Daley, Mehan *et als.* makes no such claim. She there claims that she had invested $3,000 in the acquisition of the claims, and that she owns half subject to the $3,000. She did not then think she owned them; had no conception that she had a trustee. That was an afterthought.

The record in the divorce suit was not competent. It was *res inter alias acta.* Cohn is not bound by it. If it is

competent to prove marriage, this is not the way to prove it. This was error.

The court erred in refusing to permit questions to Mrs. Daley asking if she had not sworn before the coroner that she was not married to Daley. She was a party. These declarations are competent as admissions, if it was competent to prove marriage. The court below held that as in the divorce case the court had held she was Daley's wife, the contrary could not be shown. But Cohn was not a party to it and so was not bound by the decree. Same is true as to case of Daley *vs.* Mehan *et als.*

The court erred in admitting the deposition of Mehan contradicting the deed under which he held. He could not vary it by parol.

No trust under the facts shown by testimony exists. The only other point in the case is:

Was appellant concluded by the judgment in the case of Angela Dias or Daley *vs.* A. J. Mehan, Daley, and Turner?

In other words, was Cohn, being prior lienholder, compelled to take notice and appear in a case to quiet title to the property in controversy by reason of *lis pendens* filed by Daley or Dias *vs.* Mehan?

On this point the facts are: While Mehan had the legal title by deed from Daley, Cohn levied an attachment on the premises and obtained judgment and advertised the property for sale. After our judgment and after the advertisement of the property for sale under it, Angela Dias or Daley, the appellee herein, a few days before the sale, brought suit against Mehan *et al.*, in which she claimed $3,000 as her separate property expended on the mines, and asked a sale of the property, and that she be declared half owner of the remaining proceeds under the law of community property rights. On filing the suit a *lis pendens* was also filed. Cohn was not made a party to that suit. We were valid prior lienholders of the legal title, and no suit to quiet title brought subsequent to our lien of record could possibly conclude us

unless we were made parties to the action. This is elementary, and amazement follows any serious denial or dispute of so manifest a principle.

A *lis pendens* is not a summons. It serves no such purpose. It orders nobody into court. It concludes or settles no pre-existing liens. It is a notice to subsequent lienholders or purchasers. It operates as a notice only from the time the complaint is filed, and of such facts only as are alleged in the pleading.

Walker *vs.* Goldsmith, 12 Pac., 538.

A *lis pendens* amounts to constructive notice of the claim of plaintiff to an interest in land. It is a warning to all who deal with it *thereafter* that they deal in peril of plaintiff's claim. It is not a warning against what has been done. It cannot change existing rights.

We repeat a *lis pendens* is not a summons to prior lienholders to come into court at the suit of anybody who wishes to question the title to the property. Collusive suits to defeat a lien could be filed as often as avarice or rascality might suggest, and the prior lienholder, failing from the want of actual notice or from any cause to appear and answer in every case, would be concluded by the judgment and robbed of his money.

Such monstrous effect could never be contemplated by an honest man and will certainly never be aided by a court of chancery.

There is not a case cited by counsel that decides any such thing as he contends for in this case. He relies principally upon Missouri cases that do not reach the point, for under the Missouri statute no lien is created by the levy of an attachment. No case can be found that holds squarely that a valid pre-existing lienholder is concluded by a suit to which he is not made a party, or that any lien can be divested in a suit to which the lienholder has not been called upon to appear and set out the nature of his claim.

If we held a prior lien we were not concluded by the suit of Daley *vs.* Mehan. If we did not hold a prior lien, the *lis pendens* was a notice and we were concluded. Ours was a valid prior lien with notice to the plaintiff who filed the *lis pendens.*

Our statute differs from that of most other States. It says in express and unequivocal terms: "The execution of the writ of attachment *shall create a lien* from the date of the levy on the real estate levied on." The court must repeal this statute or concede us a lien. Our statute is taken verbatim from Texas, and the court in that State decided expressly in Baird *vs.* Tice, 51 Tex., 555, that the lien arising from levy of attachment was as valid and as effective for all purposes as one arising from a valid mortgage duly recorded.

The principle for which we contend is well illustrated and decided in the case of Randolph *vs.* Duff, 21 Pac., 610, where it was held that a mortgagee of land fraudulently conveyed must take notice of a suit brought against the fraudulent grantee by the real owner of the land to declare to the legal holder a trustee when such suit is brought and *lis pendens* filed *before* any action to foreclose the mortgage is brought. If, however, the action to foreclose had been brought, and, to make it on all fours with this case, judgment had been obtained by the mortgagee, then the mortgagee would and could only be concluded by making him a party.

We purchased at the sale under our attachment and received a deed in the time and manner prescribed by law. We were *bona fide* innocent purchasers.

I call the court's attention to section 2601 Revised Statutes of Arizona, and also especially to the case of Jerome *vs.* Carbonate National Bank, found in the 43 Pac. Rep., page 215 (pamphlet No. 2, February 6, 1896), where it is squarely and correctly held that an attachment creditor is a purchaser under that statute, and that an attachment lien holds against

an unrecorded deed and is of the same rank with a judgment.

Even if there were a secret trust in this case, as was at first contended, our lien would be good against it unless we were divested or subrogated to other rights by judgment in a case to which we were parties.

It follows, then, that we were not concluded by the suit of Daley *vs.* Mehan, not having been a party to it, and that we took a good title to the property at the sale under our judgment. This being a case of first impression in Arizona, it is hoped that it may be decided on principles which will declare to bench and bar that a pre-existing lien of any kind on real property in that Territory can be divested or destroyed only by process of law; that such lienholders to be concluded by any suit touching the property must be served with summons and given their day in court.

Any other course means, in many cases, nothing more nor less than confiscation. Any other holding would open wide the gates of fraud and invite an entrance to every dishonest mortgagor and rascally debtor who pleases to bring collusive suits and rob absent and innocent lienholders of their property.

The supreme court of Arizona, in affirming the judgment of the lower court and reversing at another time the judgment of the lower court, and at a subsequent term again affirming the judgment of the lower court, from which last judgment this appeal is taken, decided that the appeal to that court was in all respects proper and regular. If the appeal had been irregular or any valid objections raised against the record, the appeal would have been dismissed. In that case there would have been no necessity for affirming or reversing the judgment below. On page 112 of the Transcript the following order is found:

"Be it further remembered that on the 31st day of July, 1895, the same being one of the judicial days of the July

term, 1895, of the supreme court of Arizona, the following proceedings were had in said cause in said court, to wit:

"In this cause the motion of appellant herein for rehearing filed herein having been fully considered by the court and the court being fully advised in the premises, it is ordered that said motion be, and the same is hereby, granted, and that the judgment of the lower court in this cause be, and the same is hereby, *reversed and cause remanded* for new trial in the court below, and it is ordered, adjudged, and decreed that the appellant herein do have and recover of and from the appellees herein his costs incurred in this cause in the lower court and the sum of forty-eight and $\frac{50}{100}$ dollars, his costs in this court."

On the 2d day of August the appellee there served on opposing counsel and filed the following motion (Trans., p. 112):

> Now comes defendant and appellee Angela Dias and moves this honorable court to set aside and annul the order and judgment made and entered in this cause in this court on the 31st day of July, 1895, reversing the former judgment of this court, made and entered on the 13th day of July, 1895, on the following grounds, to wit:
>
> 1st. That said order and judgment of July 31 was made inadvertently, unadvisedly, and without authority of law—
>
> In this, that after the judgment of this court was made on July 13, 1895, affirming the judgment of the lower court, counsel for appellant, Adolph Cohn, on the 15th day of July, 1895, in open court, prayed an appeal from said judgment to the Supreme Court of the United States, which was granted by the court, and the appeal bond fixed at $1,000, to be approved by the clerk of this court.
>
> That thereafter, on the 23d day of July, 1895, the attorneys for said appellant, Adolph Cohn, filed in this court a motion for a rehearing of said cause, and on this motion the order and judgment of July 31 was

made and entered, without service of said motion or any notice thereof to said Angela Dias or her attorneys, as required by paragraph 956 of the Revised Statutes of Arizona, and the said order and judgment of July 31, 1895, was made in less than ten days after said motion was filed, contrary to the provisions of paragraph 958 of the Revised Statutes of Arizona.

This is no application for a rehearing and conforms with no statute and with no rule of court.

On the 15th day of August the appellee filed the following alleged motion for rehearing (Trans, p. 113):

> Now comes Angela Dias, appellee above named, by her attorneys, James Reilly and A. R. English, and moves the above-named honorable court for a rehearing of the above-entitled cause on the following grounds, to wit:
>
> That the judgment made and entered in the records of the above-named honorable court on the 31st day of July, 1895, reversing the former judgment of the same court, was without jurisdiction and void, in this:
>
> 1st. Said judgment of reversal was made on motion of appellant for a rehearing, which was not served, nor any notice thereof given to said Angela Dias or her attorneys or either of them.
>
> 2d. Said judgment of reversal was made in less than ten days after the filing of appellant's motion for a rehearing of the case, and paragraphs 955, 956, and 958 require that service of a motion for rehearing shall be made on the adverse party or his attorney, and that the rehearing shall be had in not less than ten days after the return of service.
>
> 3d. The judgment of the above honorable court, made and entered on 13th day of July, 1895, affirmed the judgment of the lower court, and appellant, Adolph Cohn, appealed therefrom to the Supreme Court of the United States and prayed the above honorable court to allow his said appeal, and the court allowed the same and fixed the appeal at $1,000.

The judgment reversing the decision of the lower court was rendered at the July term and the court adjourned. When the January term was convened the court reheard the cause, notwithstanding our objection, and rendered a judgment, from which this appeal is taken. We denied the jurisdiction of the court and made at the time the following argument, which the clerk has inadvertently incorporated in the Trans., p. 116:

That the said court at this term of the court has no jurisdiction over the records of the last term of the supreme court of this Territory.

It is familiar doctrine that every court has absolute control over its records and its proceedings during the term, and not after the term has adjourned, and during the term has the right to amend, set aside, or annul all orders or decrees made in a case. This is an inherent power which cannot be abridged, taken away, or lost by any act of either party. A party taking steps to perfect an appeal does not take away the power of the court over the case during the term.

In contemplation of law a term of court is one day.

It is hardly necessary to cite authorities for a proposition so familiar. The law and cases cited will be found in vol. 12, Encyc. of Law, p. 90, and vol. 25, Encyc. of Law, p. 120. I will cite two cases:

Manchester *vs.* Herrington, 78 N. Y., 194.
Cheniquary *vs.* People, 78 Ills., 570.
Barrell *vs.* Tilton, 119 U. S., 637.

Every court *a fortiori*, a court of last resort, has the right and the power, and, more, it is its duty, at any time during the term, if it finds it has made a wrong decision, to make a new and correct one. The records of this case show that it has been before this court for a long time. It was submitted to the court on briefs and argument. A rehearing was granted and again submitted to the court on briefs and

argument. During the last term of the court, the court announced that it had reached the conclusion to affirm the decision. Appellant filed a motion for a rehearing. It was done during the term, and my recollection is the filing of the motion was announced in open court in presence of Mr. Reilly, attorney for appellees. It is possible I am mistaken in this. The court took a recess until July and then convened again in the same term of court. Just what the order made was I do not know, as I have not the records before me. If I recollect the announcement from the bench correctly, it was stated that the court had concluded to grant a rehearing and stated that, as the cause had been submitted to the court, the court had again considered the case and had reached a conclusion to reverse and remand the case for trial. In my view of it the motion for rehearing cuts no figure in this matter at all. As said before, the court had power during the term to set aside the order of affirmance and to order that the cause be reversed. It was the duty of the court to do so if the court came to the conclusion that that was a proper judgment in the case, and when that term adjourned the court had no longer power over the case, as by the adjournment of the term the case had got beyond the jurisdiction of the court.

The only power otherwise after the term is the power granted by statute, secs. 954–958, to consider and pass upon a motion for a rehearing at the next term of the court. The appellees' motion filed on the 15th day of August, 1895, while it purports to be a motion for a rehearing, is not a motion for a rehearing in any sense.

It does not state the grounds on which the party relies; it does not point out to the court any error made in its decision; offers no ground or reason why the cause should not be reversed and remanded, but it simply points out that the motion for rehearing was heard prematurely, and argues that the court had no power then to grant a rehearing;

hence this motion ought not to be considered as a motion for a rehearing.

It seeks to attack the power of the court to set aside its order, and we have shown above that the court had the power during the term to set aside the order of affirmance and to make an order of reversal.

Neither the appellee nor his attorney has filed, as we are advised, any affidavit or evidence to show that the motion for rehearing was not served upon the attorney for appellee. Whether the record is silent upon that point I do not know, but I do know that a copy of the motion for a rehearing was mailed to James Reilly, attorney for appellee, long before the order was made in July. I admit this is outside the record, but counsel should not be permitted to deny the service of a motion for a rehearing without offering the affidavit of somebody denying that they had notice of the motion. While the statute in secs. 955, 956 points out how a motion for a rehearing may be served, if there be actual service that particular method is not necessary. If the motion is made in open court in presence of counsel of the opposite side, counsel is charged with the knowledge of the procedure in open court. If service be made by mailing a copy and he received it, that would clearly be good service. If a copy be handed to the party or his attorney, that would be good service, and a party saying he had not been served should show it by affidavit; but without regard to any motion for rehearing and outside of it all, the case was submitted during the term by parties upon their briefs. The cause was in the hands of the court; the court had full power over it. It did not lose power over it when it made an order affirming the judgment, and at any time *during the term* with or *without* a motion for rehearing it clearly had power to set aside its order and make a different judgment. The statute of Arizona as to rehearing extends that power over to the next term of the court if its provisions be complied with. They were not complied with, as no *motion*

for rehearing that the court could justly consider had ever been made.

The various contradictory judgments of the court put this record in a confused light and render it somewhat unusual in length, when we contemplate the only two questions originally involved, to wit:

1*st. Is the appellant Cohn concluded from asserting title to the mining claims in question by virtue of a judgment rendered in the action to quiet title of Angela Dias vs. Mehan, Turner, and Chandler; to which action he was never made a party, though at the time suit was filed he held a valid lien on the identical property?*

2*nd. Was Daley a trustee for his alleged wife under the admissible evidence in this record* to the extent that the trust was a charge on the deed from Daley?

We think we have fully answered both these questions, and will only add that if Turner and Chandler, who held deeds from Mehan, were not bound by the *lis pendens* set up by appellee and were necessary parties to the action of Mrs. Daley *vs.* Mehan *et al.*, then neither is Cohn *a valid lienholder*, bound by the *lis pendens*, and he was a necessary party to the same suit. If Turner had not been made a party, he would not have been affected by the judgment, whether *lis pendens* was filed or not. Neither can Cohn be affected by the judgment, a lien in his favor having attached long before any suit was brought by Mrs. Daley or *lis pendens* filed by her, and we repeat here and emphasize the fact *that the lis pendens was filed on a complaint that gave no notice of any trust.* (See Supplement to Transcript, page 91.) The paper filed "Supplement to record" is a certified part of the transcript in this case. Amended answer in this case was by mistake of clerk omitted, and which could have been ordered up by suggestion of diminution of record, or filed, properly certified, without that.

The appellee does not meet the case as disclosed by the proof. With our recording acts looking them in the face,

they seem to claim that a judgment creditor of the owner of real estate in fee, as the record shows, if he levies, is to be defeated by *a secret trust resting purely and solely in parol.* This is a most dangerous doctrine, and shakes all land titles to their center, and puts parties at the mercy of uncorroborated swearing.

The adventuress living and cohabiting with a prospector in a mining camp swears she had $3,000. She is uncorroborated. Every fact surrounding her contradicts her oath. If she has any claim whatever, it is a money demand for such sum as she can show she *actually spent on the mines.*

The absence of the citation from the transcript is explained by the affidavit of the clerk of the supreme court, found on page 121 of the transcript.

Respectfully submitted.

BARNES & MARTIN, and
MARCUS A. SMITH,
For Appellant.

No. 136.

Reply Brief of Barnes for Appellant.

Filed Apr. 21, 1899.

In the Supreme Court of the United States,

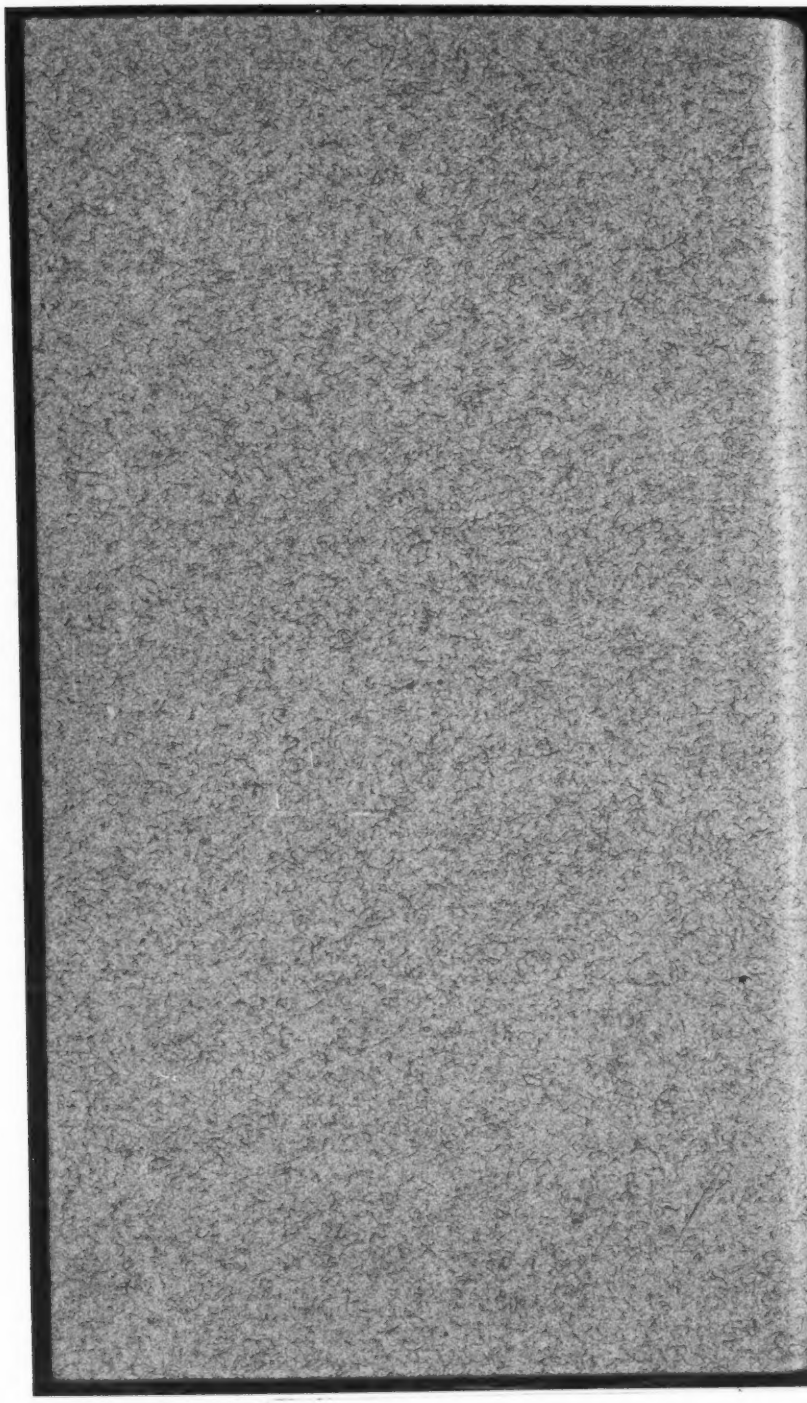
OCTOBER TERM, 1898.

ADOLPH COHN, Appellant,
vs.
ANGELA DIAS (DE DALEY, Appellee. } No. 136.

Appeal from the Supreme Court of the Territory of Arizona.

Reply Brief for Appellant.

WM. H. BARNES,
For Appellant.



In the Supreme Court of the United States,

OCTOBER TERM, 1898.

ADOLPH COHN, Appellant,
vs.
ANGELA DIAS (DE DALEY, Appellee. } No. 136.

REPLY TO APPELLEE'S BRIEF.

We deem it necessary to call the attention of the Court to some of the matters urged by Appellee in their brief.

The first forty-four pages are devoted to mere questions of proceedure, upon questions of the sufficiency of the appeal, and six pages are devoted to the merits of the case

All of those questions apply to the sufficiency of the appeal from the trial Court to the Supreme Court of the Territory. Such questions are closed so far as this Court is concerned, except so far as the Appellant here has assigned them for error.

We point out the following, however, for consideration:

Tr. p. 88. The statement of facts was "approved and signed" by the trial judge. This settled all the disagreements as to what, in this case, constituted a correct statement of facts and made that document a part of the record.

When that statement became a part of the record in the case it became a subject of reference in the Bill of Exceptions. The bill was settled and signed by the trial judge and so became a part of the record. Tr. p. 18.

These were matters solely for the trial judge and could be raised in the Supreme Court of the Territory only by motion to strike out as not properly a part of the record.

Though that Court could if it saw proper, disregard a document which it held to be *not a part of the record.*

No such motion was made, and that court did not so hold.

The statement of facts and bill of exceptions signed as above stated were treated as parts of this record. The case was reversed once and affirmed three times as the record shows and as is admitted in Appellee's brief.

Tr. p. 100. Court orders that appellant have leave to file bond and that the cause "stand submitted." This in effect disposed of all pending motions and the cause stood for hearing upon the errors assigned.

All the points raised by the appellee in this Court in the first forty-four pages of his brief were so disposed of by the Supreme Court of the Territory. No cross-er-

rors have been assigend, if they may be, and this Court cannot consider any such question.

The errors to be considered are those assigned by Appellant

Tr. p. 118. Feb. 3rd, 1896, the court as a finality "reinstated" the judgment of July 10th, 1895 and "confirmed" the same. It is from this judgment we appeal. Appellants are not responsible for this ragged, vascillating record. We attack it. We ask that it be reversed.

II.

This appeal is taken from the Supreme Court of the Territory to this Court. The case came from the trial to the Supreme Court of the Territory. That appeal was prosecuted under the laws of this Territory. This appeal is prosecuted under the Acts of Congress. R. S. U. S. 1909.

This was a bill to quit title. It was a chancery case. It is governed by the practice in chancery. Sup. R. S. U. S. 1874-1891, p. 7.

The proviso on page 8 is to be considered The Supreme Court of the Territory of Arizona has never regarded this as mandatory and jurisdictional. That the requirements are met by general judgment. That an affirmance of the judgment of the trial court carried up the findings as made below. To secure such a certificate would require a mandamus by the Court itself. But the rule is different in a chancery case. The foregoing statute we construe to apply only to cases at law, while appeals from chancery decrees are goverened by the general statute and practice in equity.

The territorial courts derive their chancery jurisdiction from the Acts of Congress and not of the Territory.

The Organic Act of Arizona (R. S U. S., Sec. 1868) provides that the district courts respectively of every territory, shall possess chancery as well as common law jurisdiction.

In 1875 Congress enacted, as explanatory of that Section, that it shall not be necessary for said Court to exercise separately common law and chancery jurisdictions, and that the codes and rules of practice in the territory, in so far as they authorize the mingling of said jurisdicti ns or a uniform course of proceeding in all cases, legal or equitable, be confirmed, and that said proceedings heretofore had in said courts in conformity with said codes so far as relates to the form and mode of proceeding are hereby validated and confirmed. By these Acts the codes can only affect the forms of pleading but they cannot take away the substance of chancery pleading and practice. By that proceedure the whole case comes before the Court of last resort to jnquire whether the proper decree was made, and if not, to either make such decree or direct one to be made.

This case was before the Supreme Court of the Territory for that purpose and the decree of the trial court was affirmed The case is here with the same status. It is as if an appeal had been taken from the Circuit Court of the United States from a decree in chancery. This Court will consider all the evidence preserved, the exceptions taken, the decree rendered, and determine what decree ought to have been rendered. Encyc. Pl. & Pr. Vol. II p. 402.

"In equity appeals an appellate court may review "questions of fact and decide for itself whether the evi- "dence is sufficient to support the decision appealed "from."

In a note that work cites the cases from all the States, we cite from this Court.

U. S. v. Old Settlers, 148 U. S. 427.
Kimberly v. Arms 129 U. S. 525.
Camden v. Stewart 144 U. S. 105.
Crawford v. Neal 144 U. S. 585.
Tilgham v. Proctor 125 U. S. 137.
Callaghan v. Myers 128 U. S. 619.
Farrer v. Ferris 145 U. S. 132.
Dravo v. Fabel 132 U. S. 487.
Hewitt v. Campbell 109 U. S. 103.
Harrell v. Beal 17 Wall. 590.

Special findings are not necessary in equity.

Kehoe v. Taylor 31 Mo. App. 589.

While the conclusions of the lower court are very persuasive, yet, when it is clear that a wrong decree has been rendered the Court will overrule.

This is our contention in this case. That the appelle has not a leg to stand on.

Her brief in this case as to the merits shows her weakness and we respectfully urge, that this Court reverse the case and direct the Supreme Court of the Territory to reverse the case with a direction to the trial Court to render a decree that Plaintiff's title be quieted.

Respectfully,

WM. H. BARNES,
For Appellant.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

ADOLPH COHN,
APPELLANT,

v.

ANGELA DIAS (DE DALEY),
APPELLEE.

No. 136.

Appeal from the Supreme Court of the Territory of Arizona.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

The statement of the case found in the brief for appellant apparently assumes that what purports to be the evidence at large (transcript, pp. 19 to 88) is before this court for review or examination. On behalf of the appellee we deny the correctness of this assumption. And as the statement of appellant is based almost entirely upon facts established, or supposed to be established, by this

evidence at large, with no special findings by the court below, counsel find it necessary to submit, on behalf of appellee, an additional statement of the case.

The case is a suit, brought under the Revised Statutes of the Territory of Arizona, by the appellant, complainant below, in the District Court for the first judicial district in and for the county of Cochise, against the appellee, Angela Dias, sued as Angela Dias de Daley, and others, to determine the title to or ownership of certain real estate, being certain mining claims, locations, and property situated in said county. Default having been made by all defendants except appellee, the cause proceeded to hearing upon complaint, answer and cross-complaint and testimony. The decree or judgment of the trial court, upon the record thus made, was in favor of appellee; appellant appealed to the Supreme Court of the Territory; the final decree or judgment of the last-mentioned court affirmed that of the District Court, and appellant thereupon appealed to this court.

There was no opinion delivered or filed by either of the courts below; there is no statement of the facts in the nature of a special verdict, by either of said courts; there is no finding by the Supreme Court of the rulings of that court on the admission or rejection of evidence, and there is no statement of the rulings of the District Court, upon the evidence, unless the incorporation into the transcript, upon appeal from its decree, of what purports to be the evidence at large, be considered as such a statement.

The proceedings in the cause, necessarily stated in detail in order to explain the situation, were substantially as follows:

September 4, 1890, bill of complaint filed by appellant, which, after formal allegations of ownership in himself, of the real estate involved in the case at bar, and adverse claims without right in defendants, alleges, as specific deraignment of title, that on September 13, 1890, A. J. Mehan, one of the defaulting defendants, was the owner of said property; that on said date said Mehan was indebted to complainant in the sum of $299; that upon said date complainant brought suit for said amount against said Mehan, in a justice court of said county, and obtained personal service upon Mehan, who duly appeared and made defence; that upon commencing said suit, September 13, 1890, complainant also caused writ of attachment to issue, which was duly levied and recorded in the office of the county recorder; that, September 29, 1891, complainant obtained judgment in said suit against Mehan; that, upon such judgment, execution issued; that such execution was duly levied and sale made thereunder, at which sale, October, 27, 1891, complainant became the purchaser of the said real estate; that said Mehan failed to redeem said property within the time allowed by law, and that thereafter complainant received constable's deed for the same, which is duly recorded in the county records. (Transcript, pp. 2 to 4.)

September 17, 1891. Answer of appellee, Angela Dias, which combined a demurrer with general denial of ownership by complainant (p. 5).

November 10, 1891. Amended answer of appellee, which, after demurring and denying specifically all the averments of the complaint, for further answer and as counter claim and cross-complaint, with prayer for affirmative relief, alleges that on April 11, 1890, and for more than five years prior thereto, appellee and one James Daley were husband and wife; that at time of their marriage Daley

owned no property or money and did not earn or acquire any during said marriage; that at date of said marriage appellee owned $3,000 in money in her own right; that, during said marriage, appellee and Daley used all of said sum prospecting for, locating, procuring, preserving and maintaining title to the mining claims involved in the suit; that during this time appellee was uneducated and utterly ignorant of the language, laws, and customs of the United States, and, confiding and relying upon the advice and direction of her husband, advanced her money for the purposes aforesaid; that, taking advantage of this ignorance and confidence, Daley took and kept title to all of said property in his own name without the knowledge or consent of appellee; that on said 11th day of April, 1890, Daley abandoned appellee and has never since returned to or communicated with her; that, on September 2, 1890, Daley conveyed all of said property, without consideration, to Mehan, who had full knowledge and notice of appellee's equities; that Cohn purchased at the constable's sale, with full notice and knowledge of said equities, and also that Mehan gave no value for the conveyance to him; that, October 15, 1890, appellee commenced an action, No. 1534, in said District Court for said county against said Daley for divorce, for a decree awarding her all of said property, and for restoration of her former name of Angela Dias; that thereafter such proceedings were had in said cause that, May 14, 1891, the said court gave and entered its judgment and decree dissolving said bonds of matrimony, awarding appellee all of said property, and permitting her to resume her former name (pp. 5 to 9).

May 26, 1892. Answer of appellant to amended answer and cross-complaint, uniting a demurrer with denial (p. 9).

May 28, 1892. Supplemental amendment of appellee

to answer and cross-complaint, filed by leave of court, further averring that, October 18, 1890, prior to the purchase of the premises by appellant, appellee commenced an action in said District Court, No. 1535, against said Daley and Mehan, to quiet title to said property; that on said 18th day of October, 1890, after filing said suit, appellee filed and recorded in the office of the county recorder a notice of the pendency of said action containing the names of the parties, the object of the suit, and description of the property; that thereafter such proceedings were had in said suit that, upon the 26th day of May, 1892, said court entered a decree and judgment therein declaring appellee the owner of all of said property, and quieting her title thereto against said Daley, Mehan, and all persons claiming under them by title subsequent to the record of said notice; and that Cohn took title from Mehan after such record and has no other title thereto (pp. 10, 11).

May 27 and 28, 1892. Minutes of court showing order sustaining demurrer of appellee to complaint of appellant, with leave to amend; amendment of complaint at bar; order allowing appellee to amend cross-complaint; amendment of same at bar, as last above noted; introduction of testimony upon part of both parties, and submission of cause to court (pp. 11, 12).

November 22, 1892. Order of court finding the issue involved in favor of the defendant, the appellee, Angela Dias, and directing that judgment be entered accordingly (p. 12).

November 25, 1892. Decree of court. This decree, after declaring default as to all defendants except appellant, and after finding her name to be Angela Dias, and after finding generally against the complainant and in favor of the defendant, Dias, thereupon proceeds (p. 13):

"Now, therefore, it is ordered, adjudged, and decreed that the said defendant, Angela Dias, is the owner and entitled to the possession of all the mining claims and interests in mining claims in the cross-complaint in plaintiff's complaint in this action and hereinafter set out, named, and described as against said plaintiff, Adolph Cohn, and against each and every one of the defendants, A. J. Mehan, Dewitt C. Turner, Bell H. Chandler, and F. C. Fisher. And her title thereto is hereby settled and quieted as against said plaintiff and said defendants and each and every of them and all persons claiming or to claim under them or under any or either of them; and it is further ordered, adjudged, and decreed that said defendant, Angela Dias, do have and recover of and from the said plaintiff, Adolph Cohn, her costs incurred in this suit, taxed at $91.55."

November 25, 1892. Minutes of court showing argument and submission of motion for new trial (p. 12).

November 26, 1892. Minutes of court showing order overruling above motion for new trial; exception by complainant; notice of appeal, and the following order relative to the filing of a statement of facts:

"And the court does hereby grant to said plaintiff thirty days after the adjournment of this term to file his statement of facts herein."

The November term of the court, whereat the judgment or decree of November 25, 1892, was passed, adjourned December 29, 1892. See Certificate of Clerk (Transcript, p. 98), dated January 16, 1894, and filed in the Supreme Court of the Territory, January 22, 1894. The time allowed for filing a statement of facts by this order therefore expired January 28, 1893.

December 16, 1892, attorney for Cohn, appellant, submitted to attorneys for Dias, appellee, what was termed

"a full statement of facts." (Transcript, p. 87.) This statement was what purported to be the entire evidence at large, as made up from the stenographer's report thereof. It was not accepted by attorneys for Dias as correct, but on the contrary, at a date not shown by the record, said attorneys endorsed thereon, or attached thereto, their dissent and objection upon the ground that the same did not embrace certain documentary evidence introduced at the trial. (Transcript, p. 87.) Thereafter, to wit, March 6, 1893, attorney for appellant submitted to the court an amended statement, including said evidence, or what purported to be such, and thereupon, on said date, the court passed the following order (pp. 87, 88):

"Counsel for plaintiff in the above-entitled cause of Cohn *v.* Mehan *et al.*, having heretofore, to wit, on the 16th day of December, 1892, submitted to me a statement of facts in said cause, and the same having been thereupon submitted to counsel for defendants, and being by them disagreed to as correct, and being likewise found by me to be incomplete, because omitting documentary evidence, said counsel for plaintiff did thereafter, to wit, on the 6th day of March, 1893, submit the foregoing as an amended statement of facts in said cause, and the same was, on said 6th day of March, 1893, by me approved and signed."

This so-called statement of facts was filed in the cause, in the clerk's office of District Court in May, 1893. (Transcript, p. 19.) There is nothing in the record to show that either the original, or the amended paper, was ever at any time filed in the cause prior to the last above-mentioned date. As above stated, this so-called statement of facts is the entire body of the proceedings at the trial according to the stenographer's notes (pp. 19 to 88).

December 16, 1892, being the same date upon which

the statement of facts was exhibited to adverse attorneys, appellant filed, in said District Court, what is termed a bill of exceptions. This paper contains twelve statements of claimed errors in the trial court, including the overruling of the motion for new trial, which motion is set out in full. The entire bill, however, has reference to the statement of facts, and without such statement is hardly intelligible as raising any specific point of law (pp. 14 to 18).

Immediately following the statement of facts, as found in the transcript, is an assignment of errors, upon the appeal, which shows no date of filing (pp. 88, 89). January 28, 1894, however, there was filed in the Supreme Court (Transcript, p. 102) a certificate of the clerk of the District Court to the effect that such assignment was filed in said District Court and attached to the transcript before the latter was delivered to attorney for appellant. The errors assigned are substantially the points mentioned in the bill of exceptions.

January 9, 1893. Appeal bond filed, in sum of $300, approved by clerk (p. 90).

September 29, 1893. Certificate, clerk of District Court, that transcript, as above summarized, was demanded by appellant March 6, 1893, and was delivered to appellant September 29, 1893 (p. 90).

December 25, 1893. Appellant filed in the Supreme Court of the Territory, endorsed "Supplement to record," an exemplified copy of the bill of complaint in the District Court, in the case of Dias *v.* Daley, Mehan *et al.*, No. 1535, being the case mentioned in appellee's supplemental amendment to answer and cross-complaint (pp. 91 to 93).

January 9, 1894. Motion by appellee, filed in Supreme Court of the Territory, to strike from the transcript certain portions thereof, as follows: (1) The statement of

fact, because the same was not approved, settled, signed by the trial judge or filed within the time allowed by statute; (2) The bill of exceptions, because it does not contain a statement "with circumstances," or so much of the evidence as is necessary to explain the same; (3) The assignment of errors, because not filed before the delivery of the transcript; (4) The paper filed December 5, 1893, because not properly part of record (pp. 93, 94).

January 9, 1894. Motion by appellee, filed in Supreme Court, to dismiss the appeal on the grounds: (1) That there is no transcript on file properly certified under the law; (2) That the appeal bond filed is insufficient (p. 94).

January 9, 1894. Order of court allowing appellant until January 11, 1894, to answer last above motion (pp. 94, 95).

January 11, 1894. Answers of appellant to both of the above-mentioned motions filed (pp. 95 to 98). These "answers" are simply arguments of the matters presented by the motions. That directed to the motion to strike out, however, incorrectly states that the statement of fact was signed by the court during the term. The fact is exactly the reverse, as hereinbefore set forth.

January 25, 1894. Order of court that the bonds on appeal, original and supplemental, theretofore filed, are insufficient; that appellant have leave to file sufficient bond and reply brief before January 29, 1894, and that upon the incoming of said bond and brief, the cause stand as submitted (p. 100).

January 25, 1894. Appeal bond filed under order of court last above (p. 101).

March 8, 1894. Decree of court affirming the decree of the District Court, as follows, (p. 102):

"This cause having been heretofore submitted and by

the court taken under consideration, and the court having considered the same and being fully advised in the premises, it is ordered that the judgment of the lower court be, and the same is hereby, affirmed; and it is further ordered, adjudged, and decreed that the appellees herein, A. J. Mehan, Dewitt C. Turner, Bell H. Chandler, F. C. Fisher, and Angela Dias de Daley, do have and recover of and from the appellant, Adolph Cohn, and his sureties, David Cohn and S. Tribolet, on the appeal bond herein, the sum of $91.55, their costs in the court below, and the further sum of $, their costs in this court."

March 15, 1894. Motion for rehearing, based upon the assumption that the so-called statement of facts was before, and considered by, the court, and alleging errors by the court in not reversing the decree below for the following reason: (1) There was no evidence of a resulting trust in favor of appellee; (2) And no competent evidence of an express trust; (3) Legal title was, therefore, in Mehan at time of levy and appellee has no equity (pp. 102, 103).

January 14, 1895. Motion or request of court, by appellant, that, in case rehearing be not granted, the court will file proper findings or make such suggestions as will enable counsel to prepare the same (pp. 103, 104).

January 16, 1895. Order granting appellant's motion for rehearing and placing cause at the foot of the calendar (p. 104).

January 17, 1895. Order of the court that all motions be deemed submitted and case be considered in regular order on the printed calendar (p. 104).

July 10, 1895. Decree of court again affirming the decree below as follows (p. 104):

"This cause having been heretofore submitted and by the court taken under consideration, and the court having

fully considered the same and being fully advised in the premises, it is ordered that the judgment of the lower court rendered herein be, and the same is hereby, affirmed; and it is further ordered, adjudged, and decreed that appellee Angela Dias herein do have and recover of and from the appellant herein and S. Tribolet and Emil Sydow, the sureties on the appeal bond herein, the sum of ninety-one and $\frac{55}{100}$ dollars, her costs in the lower court, and her costs in this court, taxed at sixteen dollars."

July 10, 1895. Motion or request to court, by appellant, to file statement of facts in the nature of a special verdict and also of rulings upon the evidence (pp. 104, 105).

July 10, 1895. Order of court denying above motion (p. 105).

July 15, 1895. Prayer, in open court, for appeal to the Supreme Court of the United States, with affidavits showing value of premises to be $20,000 (pp. 105 to 107).

July 15, 1895. Order of court allowing appeal as prayed (p. 105).

July 23, 1895, after the allowance by the Supreme Court of the Territory of an appeal to this court, as above noted, there was filed in the court below a paper which is denominated a "petition for rehearing." It commences, in form, as a motion by appellant for rehearing, and thereafter, for some two pages and a half of printed matter, is an argument or brief upon the evidence at large to show that the court erred in its decrees or judgments of March 8, 1894, and July 10, 1895 (*supra*). It is not signed by the appellant in proper person or by any attorney or counsel, and was not served upon or noticed in any way to the appellee or her attorney or counsel (pp. 107 to 110).

July 29, 1895. Appeal bond, upon appeal to this court executed by appellant, which bond was, upon the 31st day

of July, 1895, in the language of the indorsement thereon, "lodged" with the clerk of the Supreme Court of the Territory, after having been, upon said last-mentioned date, approved by him. This bond was subsequently, February 27, 1897, approved by an associate justice of said Supreme Court, and, in the language of the indorsement thereon, was, upon said 27th day of February, 1897, "filed" in the cause. It is the only bond securing appellee upon this appeal (pp. 110, 111).

July 31, 1895. Order of court, July term, passed on the very day upon which the bond upon appeal to this court was approved by and "lodged" with the clerk granting entirely *ex parte*, so far as the record shows, the so-called unsigned, unserved, and unnoticed motion filed July 23, 1895, as hereinbefore recited. This order was in words and figures as follows (p. 112):

"In this cause the motion of appellant herein for rehearing, filed herein, having been fully considered by the court, and the court being fully advised in the premises, it is ordered that said motion be, and the same is hereby, granted, and that the judgment of the lower court in this cause be, and the same is hereby, reversed, and cause remanded for new trial in the court below, and it is ordered, adjudged, and decreed that the appellant herein do have and recover of and from the appellees herein his costs incurred in this cause in the lower court and the sum of forty-eight and 50/100 dollars, his costs in this court."

August 5, 1895. Motion by appellee to set aside and annul said last above-mentioned order upon the ground that it was made inadvertently, unadvisedly and without authority of law because: (1) It was passed after appeal allowed to this court; (2) It was passed without service upon or notice to appellee, as required by paragraph 956 of the Revised Statutes of Arizona; (3) It was passed

less than ten days after motion filed, in violation of paragraph 958 of said Revised Statutes (p. 112).

August 15, 1895. Motion by appellee for rehearing, upon substantially the same grounds alleged in support of the motion to set aside and annul. This motion was accompanied by the affidavit of J. L. B. Alexander, clerk of the court, to the effect that the appeal bond hereinbefore noted as having been approved and "lodged" with him, as such clerk, was filed in the cause in said court by affiant, at request of appellant, on the morning of the 31st day of July, 1895, before the coming in of the court, on said date, and before the rendering of any decision by said court reversing the judgment of the District Court (p. 114).

January 22, 1896. Motion by appellant to strike out affidavit of J. L. B. Alexander (115, 116).

January 22, 1896. Response, so called, of appellant to appellee's motion to set aside order of July 13, 1895. This paper is simply a brief by attorney for appellant (pp. 116 to 118). It is admitted to be improperly in the record by counsel for appellant in their brief filed in this court (brief, p. 26).

February 3, 1896. Order of court denying appellee's motion to set aside decree or judgment, granting appellee's motion for rehearing and setting cause down for hearing February 7, 1896 (p. 118).

February 11, 12, 13, 1896. Minutes of court showing argument and submission of the cause (pp. 118, 119).

October 2, 1896. Decree of court, November term, 1896, setting aside decree of July 31, 1895, and reinstating decree of July 10, 1895, affirming decree of District Court. This decree is as follows (p. 119):

"In this cause the motion of appellees herein to set

aside the order and judgment of this court, made and entered herein on the 31st day of July, 1895, reversing the judgment of the lower court in this cause, having been argued by counsel for appellant and appellees respectively, and duly submitted and by the court taken under consideration, and the court having fully considered the same and being fully advised in the premises, it is ordered that said motion be, and the same is hereby, sustained, and the order granting appellant's motion for rehearing proceeding said judgment of July 31, 1895, and the said judgment of July 31, 1895, in this cause be, and the same is hereby, set aside and annulled, and the said motion for rehearing is denied, and the judgment of this court of July 10, 1895, is hereby reinstated and confirmed in this cause."

February 24, 1897. Motion by appellant, in open court, for allowance of appeal and also that findings be made and filed by the court; order of court granting said appeal; order of court that the motion for findings be submitted (pp. 119, 120).

February 27, 1897. Approval of appeal bond by the court, being the identical bond hereinbefore mentioned as filed July 29, 1895 (pp. 111, 120).

March 18, 1897. Assignment of errors in the court below filed by applicant upon appeal to this court.

From the preceding abstract of the proceedings in the cause, it thus appears, as matter of fact, and proper, as part of our statement:

First. That upon the appeal to this court, the record shows no statement of the facts of the case, either in the nature of a special verdict, or otherwise, made and certified by the court below, the Supreme Court of the Territory, and transmitted to this court with the transcript.

Second. That the record shows no statement whatever of the rulings of the court below, the Supreme Court of

the Territory, upon the admission or rejection of evidence, made and certified to this court with the transcript.

Third. That the Supreme Court of the Territory, although requested by appellant, by motion or otherwise, to file such statements, refused to do so, and expressly overruled and denied a motion by appellant in that regard filed and submitted.

Fourth. That the cause, as presented to the Supreme Court of the Territory, upon the appeal from the District Court, directly presented the question whether the appellee was not entitled to a decree affirming that of the District Court on the ground that a statement of facts was not made out, signed and filed in the District Court within the time allowed by the laws of the Territory.

Fifth. That the Supreme Court of the Territory made four decrees, in the nature of final judgments in the cause; that the first two of such decrees, those of March 8, 1894 (p. 102), and July 10, 1895 (p. 104), affirmed the decree of the District Court; that the third of such decrees, that of July 31, 1895 (p. 112), reversing the decree below, was made *ex parte*, upon motion not noticed to the appellee; that the fourth, that of October 2, 1896 (p. 119), reinstated the first two decrees and again affirmed the court below, and that all of said decrees affirming the court below may, upon the record, have been based solely upon a finding that no statement of fact was filed in the District Court in compliance with law.

Sixth. That the statement of facts or evidence at large, certified by the District Court, is not approved or adopted by the Supreme Court of the Territory by any of the four decrees made as above recited.

Seventh. That no alleged error in the admission or rejection of evidence is brought to the attention of this court, by either the bill of exceptions, the assignments of error,

or in any other way, except by reference for necessary explanation to the statement of facts or evidence at large, filed in the District Court under the circumstances recited.

BRIEF.

The brief of counsel for appellant proceeds entirely upon the theory that the facts in the case, as and how they may appear by the evidence at large, filed in the District Court, are before this court for review. Proceeding upon this theory, counsel first state certain of the facts shown by this testimony, add other alleged facts not so shown even by offers of proof, and thereupon argue two propositions which they assume to rise upon such facts. Entertaining as we do an entirely different conception of the position of the case in this court, we find it impossible to follow the brief of our opponents. Instead thereof we desire to submit certain propositions following the statement of facts which we have ourselves above set out.

I.

QUESTIONS OF LAW, ONLY, ARE HERE FOR REVIEW.

To review in this court the final decree or judgment of the highest court of a Territory, in a case tried by the court without a jury, the remedy is by appeal. An appeal thus prosecuted raises no question of fact and only such questions of law as may appear from a specific statement of facts in the nature of a special verdict or from a statement of the rulings of the trial court upon the admission or rejection of evidence duly excepted to at the trial.

Act of April 7, 1874, 18 Stat. 27, 28.

Hecht *v.* Boughton, 105 U. S. 235.

Idaho & O. L. Co. *v.* Bradbury, 132 U. S. 509, 513, 514, 515.
San Pedro Co. *v.* U. S., 146 U. S. 120, 130, 131.
Haws *v.* Victoria Co., 160 U. S. 303, 312, 313.
Salina Stock Co. *v.* Salina Creek Co., 163 U. S. 109, 118.
Marshall *v.* Burtis, January 30, 1899 (unreported).

Upon an appeal of this character, the special finding, or statement, is not a mere report of the evidence but a finding of the ultimate facts upon which the rights of the parties are to be determined; and a bill of exceptions cannot be used to bring up the whole testimony for review.

Act of March 3, 1865, 13 Stat. 501.
Norris *v.* Jackson, 9 Wall. 125, 127, 128.
St. Louis *v.* W. U. T. Co., 116 U. S. 388, 391.

In other words, this court has now before it no question of fact; it will not undertake to say whether, upon the whole testimony, the decree is sustained by the evidence, and it will only consider such questions of law, if any, as are presented by a statement of facts in nature of a special verdict, or by a similar statement showing rulings of the trial court during the progress of the trial.

II.

The Record Contains No Special Verdict.

It will be borne in mind that neither of the courts below filed any opinion; that in the Supreme Court of the Territory no statement of facts whatever was filed or approved, and that the only finding or statement of facts filed or approved in the trial court was the entire body of

the evidence according to the stenographer's notes thereof, which was certified to the Supreme Court of the Territory in supposed compliance with the statute.

The civil procedure act of Arizona, governing the preparation of findings or statements of facts upon appeal, is found in sections 843, 844, and 845 of the Revised Statutes of said Territory (1887, p. 186), and is as follows:

"843. (Sec. 195.) After the trial of any cause either party may make out a written statement of the facts given in evidence on the trial and submit the same to the opposite party or his attorney for inspection. If the parties or their attorneys agree upon such statement of facts, they shall sign the same and it shall then be submitted to the judge, who shall, if he find it correct, approve and sign it, and the same shall be filed with the clerk during the term."

"844. (Sec. 196.) If the parties do not agree upon such statement of facts, or if the judge do not approve or sign it, the parties may submit their respective statements to the judge, who shall from his own knowledge with the aid of such statements, during the term, make out and sign and file with the clerk a correct statement of facts proven on the trial, and such statement shall constitute a part of the record."

"845. (Sec. 197.) The court may, by an order entered upon the record during the term, authorize the statement of facts to be made up and signed and filed in vacation, at any time not exceeding thirty days after the adjournment of the term."

The act of Congress of April 7, 1874 (18 Stat. 27, sec. 2), concerning practice in the territorial courts, after declaring that the appellate jurisdiction of this court, in cases of trial by jury, shall be exercised by writ of error, and in all other cases by appeal, according to such rules

and regulations as to form as the court may prescribe, thereupon provides (p. 28):

"That on appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below, and transmitted to the Supreme Court, together with the transcript of the proceedings and judgment or decree."

Under this legislation, national and territorial, it is obvious that in the case at bar there is no statement of facts in the nature of a special verdict, upon which can be predicated any question of law. The statute of Arizona undoubtedly contemplates a finding of ultimate facts, in condensed and succinct form, based upon the evidence at large, not a mere report of the evidence, complete or partial, upon which such ultimate facts rest. The federal statute is equally plain and unambiguous. It distinctly provides that *instead* of the evidence at large, there shall be a statement of facts "in the nature of a special verdict;" that is to say, a special finding of specific ultimate facts, from the evidence at large, to which the court may apply the law. That this is the meaning, force and effect of this statute of 1874, is settled by repeated decisions of this court. It is an undying principle of all the cases cited under the last above subdivision of this brief and is specifically declared in the following cases arising under the similar acts of March 3, 1865 (13 Stats. 501), and February 16, 1875 (18 Stats. 315), and the territorial act of April 7, 1874:

Norris *v.* Jackson, 9 Wall. 125.

Dirst *v.* Morris, 14 Wall. 484.

Boogher *v.* Insurance Co., 103 U. S. 91, 97.

The City of New York, 147 U. S. 72.
Lehnen *v.* Dickson, 148 U. S. 71 to 74.
St. Louis *v.* W. U. T. Co., 166 U. S. 388, 391.
Marshall *v.* Burtis, January 30, 1899 (unreported).

It follows, therefore, even if the entire evidence as a whole be considered as properly in the case, for any purpose, that it is not a statement of facts in the nature of a special verdict, within the meaning of the act of April 7, 874, and that no questions of law are, by this method at least, here presented for review.

III.

The Record does not Show the Rulings of the Trial Court on Admission or Rejection of Evidence.

The federal statute of 1874 obviously contemplates that, in addition to the statement of facts in the nature of a special verdict, the court below shall also make and certify to this court an additional special statement of the rulings of the trial court upon the admission or rejection of evidence. The general purpose of the statute was to permit the courts of the Territories to unite common-law and equity proceedings in the same cause, and that when causes, so tried, were to be reviewed in this court, it should be by writ of error in all cases of trial by jury and in all other cases by appeal. The purpose seems to have been, in cases of appeal, to bring questions of law before this court by means of special findings or statements made by the court below. A fair reading of the first proviso to the second section of the act is that there should be certified not only a statement of the facts in the nature of a special verdict, but that all other questions of law should also be

certified in like manner, thus avoiding the usual incident of a trial by jury, the ordinary bill of exceptions. No such finding or statement of the rulings of the trial court on the admission or rejection of evidence has, in the case at bar, been certified to this court by the Supreme Court of the Territory. There is, therefore, nothing, in this form, before the court upon which it can review any question of law.

Without such a special statement, as apparently required by the act of 1874, there are, in any event, only three ways in which questions of law can arise in this court:

First. By a bill of exceptions properly drawn and containing within itself such a statement of circumstances and so much of the evidence as is necessary to explain the questions presented.

Second. By a bill of exceptions referring to some accepted, determined or authorized statement of facts making the questions intelligible.

Third. By some accepted, determined or authorized statement of facts, from which, by assignments of error properly filed, the rulings of the trial court complained of may sufficiently appear.

We submit that the record in the case at bar, in none of these forms, properly presents any question of law to the court. And as this proposition rests largely upon the question whether there is in the case any statement or finding of fact, available to appellant, for any purpose whatever, we submit the following subordinate propositions:

(*a*) The evidence at large, the only statement found in the record, is not properly before this court even to raise or present questions of law, not having been filed within

the period required by statute and never having been affirmed, approved, or adopted by the Supreme Court of the Territory.

(*b*) The bill of exceptions found in the transcript does not contain, within itself, such a statement of circumstances and so much of the evidence as is necessary to show the questions presented.

(*c*) The bill of exceptions, deficient as above, cannot be rendered certain by reference to the excluded statement of fact.

(*d*) The excluded statement of fact, the whole evidence, cannot, upon assignments of error, be considered to determine questions of law.

(a) *The evidence at large not in the case for any purpose.*

The evidence at large was not properly in the case, for any purpose whatever, in the Supreme Court of the Territory, and is not properly here for consideration. The statement at large, now found in the transcript, was not made out, signed, and filed in the trial court within the time authorized by the Revised Statutes of the Territory, Sections 843, 844, and 845, hereinbefore quoted in full. Section 843 provides for the preparation of a written statement of facts, by the parties themselves, to be approved and signed by the judge and filed with the clerk "*during the term.*" Section 844 provides for the contingency of the parties themselves not agreeing upon a statement of facts, and in that event for the submission to the court of counter claims of fact, and the settlement by the court of such a statement, which is to be signed and filed with the clerk "*during the term.*" Section 845 gives the court the power, by order entered upon the record, "during the term," to authorize a statement of facts

to be made up, signed, and filed in vacation, at any time "*not exceeding thirty days after the adjournment of the term.*"

The facts in the case at bar are that the decree of the trial court in favor of the appellee, defendant below, was made and entered at the November term of said court, to wit, November 25, 1892 (Transcript, pp. 12, 13, 14); that the November term of the court adjourned December 29, 1892 (Transcript, p. 98); that during said term, November 26, 1892 (Transcript, p. 12), the court passed an order allowing the plaintiff thirty days after the adjournment of the term to file his statement of facts; that this extended period for filing such statement expired January 28, 1893; that during this extended period the only thing done by the plaintiff to comply with the statute and the said order of court was to exhibit, December 16, 1892, to the judge of said court and to the attorney for the defendant a so-called statement of fact, which statement, while purporting to be the stenographer's transcript of the evidence at large, was not such in fact, but omitted a large portion, if not all, of the documentary evidence introduced by the defendant; that this proposed statement of fact was not accepted nor concurred in by the attorney for defendant; that thereafter, to wit, March 6, 1893, long after the adjournment of the term, attorney for appellant submitted to the court an amended statement, including what purported to be the evidence previously omitted, which amended statement was on said last mentioned date, and no earlier, approved and signed by the court (Transcript, pp. 87 and 88); that this amended statement was not filed in the cause in the clerk's office, in the District Court, until May, 1893, over three months after the adjournment of the November term (Transcript, p. 19); that even this amended state-

ment did not include, as shown upon its face, all the documentary evidence introduced at the trial, in that it omitted the pleadings in cases No. 1534 and No. 1535 (see agreement, transcript, page 82); that after the transcript had been filed in the appellate tribunal the plaintiff attempted to add to it, in that court, an exemplified copy of the complaint, only, in a single one of said causes (pp. 91 to 93), which paper defendant promptly moved to strike from the transcript (p. 94); that the defendant, the appellee here, never at any time consented to the correctness or to the filing of said statement, either during the November term or thereafter; that upon the contrary, as soon as the transcript reached the Supreme Court of the Territory, to wit, January 9, 1894, the defendant filed motions both to strike out the transcript and to dismiss the appeal, upon the ground, among others, that the statement of fact in question had not been filed within the time allowed by law (Transcript, pp. 93 and 94); that, after answers to these motions and various other proceedings had, the court, March 8, 1894, with these motions duly submitted and taken under consideration, made and entered its first decree, affirming, in general terms, the decree of the District Court (p. 102).

In other words, even considering the evidence at large as a finding of fact in the nature of a special verdict, or as a statement of the rulings of the trial court upon the admission or rejection of evidence, as required by act of 1874, still it was not filed within the time required by the statute of the Territory, and the case thus went to the Supreme Court of the Territory, upon appeal, with no statement of fact, either general or special, upon which the appeal might be considered and decided.

We submit that the revised statutes of the Territory, governing this question, are entirely clear and unam-

biguous. Time is evidently of the essence of the statute in respect to the preparation of the statement. The law in this regard is mandatory. All three sections referred to are explicit in requiring the particular thing referred to to be done within a specific period. If the statement of fact is settled by the parties themselves without the intervention of the court, it must be so done and filed "during the term." If settled by the court, where the parties disagree, it must be signed and filed "during the term." And, apparently, in order to make the limitation of time clearly mandatory, the next succeeding section limits any extension of time to the specific period of thirty days by an order of the court made "during the term" and limits the extension to thirty days "after the adjournment of the term."

It would be difficult to devise language more clearly and specifically showing the legislative intent to require this statement to be filed within a certain period in order to make the appeal effective. If not so filed it seems clear that it cannot, in any event, unless by consent of the parties, and perhaps not even then, be considered as perfecting the record so as to entitle the appeal to consideration.

The Supreme Court of the Territory, as early as April, 1890, four years prior to its first decree in the case at bar, had occasion to give construction to the provisions of the practice code and, at that time, in a decision which has ever since been the rule of procedure, held and decided, among other things:

(1) That it had no jurisdiction unless the appeal bond was filed in the court below within the time prescribed by the statute; (2) That the transcript must affirmatively show that such bond was filed within the statutory period; (3) That exceptions might be preserved by incorporation

into the statement of facts, with accompanying bill of exceptions, but only where such statement and bill were prepared and filed in strict conformity to the requirements of the statute, time included; (4) That the transcript must affirmatively show that both statement and bill were filed within the statutory period; (5) That in default of compliance with these requirements the appeal might be either dismissed or the judgment below affirmed.

Sutherland *v.* Putnam, 24 Pac. Rep. 320.

Under this obviously correct interpretation of the statute, it makes no difference whether, after the transcript had been filed in the appellate court, the appellee was entitled to show the date of the adjournment of the term by filing the official certificate of the clerk of the court below. The defendant, if relying at all upon the statement, was required affirmatively to show by the transcript that the statement was filed in time. We submit, however, that in respect to such a question, the certificate of the clerk was competent to complete the transcript.

In this connection it is important to note the further fact that the Supreme Court of the Territory, during all the time that the case was pending before it, never, at any time, by any of its various decrees or orders, accepted, affirmed, or approved this finding of facts, or the attempted introduction into it of a part of the pleadings in cause No. 1535, and still further that the said court not once but repeatedly declined and refused to file any findings or statement of facts upon which its own decrees proceeded. (Transcript, pp. 103, 104, 105, 119, 120.)

In other words, the statute of the Territory required this statement of fact to be filed within a certain period; that was not done; the defendant, upon that ground, moved the Supreme Court for such action therein as might

be necessary in view of this defect, and upon consideration of the case thus presented the court, four years after the decision in Sutherland *v.* Putnam (*supra*) giving construction to the act, upon the motions and without consideration of the so-called statement, passed and entered its final decree affirming the decree of the court below and refused to make or file any findings of fact. From these circumstances but one conclusion is to be drawn, to wit, that the Supreme Court of the Territory found the record as brought to it to be without any statement of fact and the defendant below therefore entitled upon that ground, if upon no other, to an affirmance of the decree of the District Court.

It thus appears, we respectfully submit, that the record in the case is now before this court without any finding of fact whatever under the statue of April 7, 1894, upon which it can proceed to review the action of the court below. The so-called statement was not filed in the trial court within the time required by the mandate of the local statue; the Supreme Court never accepted, approved, or affirmed the same, but upon the contrary proceeded in the case consistently with a rejection thereof, and such statement, so in default of the time requirements and so lacking the approval of the court below, cannot be here considered for any purpose whatever.

(b) *The bill of exceptions not complete within itself.*

The bill of exceptions presented to and approved by the trial court is found at pages 14 to 18 of the record. It prefaces a statement of the rulings complained of by the assertion that "the following proceedings were had, as more fully appears in the statement of facts herein, expressly referred to, and the exceptions to rulings of the

court as therein shown are made a part of this bill of exceptions." The bill thereupon proceeds to state twelve alleged rulings of the trial court to which objections were taken. We submit, without at this point discussing them in detail, that, in the absence of a statement of facts explanatory thereof, no one of these separate allegations of error is a good bill of exceptions within the rules of law, inasmuch as no one of them contains within itself a statement of the circumstances connected with the ruling and enough of the evidence to explain the same. Every one of the twelve exceptions, not only generally, as above noted, but separately, by necessity, refers to and rests upon the statement of facts. The twelfth exception is to the order overruling the motion for a new trial, and includes the whole of the motion, itself containing repeated references to the statement for explanation. Indeed, it is obvious that the pleader had no idea of framing the bill otherwise than by reference to a statement which had been contemporaneously prepared, but which, as hereinbefore noted, was never filed or approved by the court, or in any way made part of the transcript. And, as thus prepared, the bill of exceptions itself, and within itself, is not such a statement of the rulings and exceptions as the law requires.

The general rule, too well established to excuse, in this court, the citation of authorities, is that a bill of exception must set forth clearly and distinctly all the facts upon which the ruling complained of was based and the exact adjudication or ruling in respect to which error is claimed; that error must be made to affirmatively appear; that if the bill be capable of two constructions, that most favorable to the validity of the judgment must be adopted, and that the bill will always be taken most strongly against the party taking the exception.

Following the primary rule upon this subject, the code of

civil procedure of the Territory, under the heading of bill of exceptions, expressly declares how such a bill must be framed. Sections 824 and 825 of this code (1887, page 184) provide:

"824 (Sec. 176.) No particular form of words shall be required in a bill of exceptions, but the objection to the ruling or action of the court shall be stated with such circumstances, or so much of the evidence as may be necessary to explain it and no more, and the whole as briefly as possible."

"825 (Sec. 177.) Where the statement of facts contain all the evidence requisite to explain the bill of exceptions, it shall not be necessary to set out the evidence in the bill of exceptions, but it shall be sufficient to refer to the same as it appears in the statement of facts."

Under these provisions of law, where a statement of fact contains all the evidence necessary to explain the exception, the bill need not necessarily set out such evidence otherwise than by reference to the statement. But if there be no such statement, then the bill itself must show the ruling or action of the court by setting out the circumstances under which it was made and also so much of the evidence as is necessary to explain the action taken.

In the case at bar, as already shown, there is in law no statement of fact whatever in the record. The reference to such a statement in the bill of exceptions does not, therefore, explain the rulings questioned. And as the bill itself does not meet the requirements of the general rule and the statute, it results that no question of law is, by means of said bill, presented to this court for review.

(c) *The bill of exceptions not aided by its reference to the statement of fact.*

This court has intimated, and perhaps held, that upon

exceptions duly taken and here exhibited by bill, a reference for explanation thereof may be made to the whole evidence at the trial if the same has been duly incorporated in the record (Idaho & Oregon Land Company *v.* Bradbury, 132 U. S. 509, 514, 515, 518). But in the case at bar there is in law no statement of fact whatever in the record. And this being so, it is obvious that a defective bill of exceptions cannot be perfected by reference to such a statement. The pleader appears to have drawn a bill of exceptions based upon the assumption that a statement contemporaneously drawn would become a legal statement in the case. This expectation, unfortunately for appellant, was not subsequently realized. The appellant is thus left without a legal statement upon which to rest his bill of exceptions, and the bill necessarily falls.

(d) *The statement, upon assignment of errors, not available to raise legal questions.*

There are in the case as now pending in this court two different assignments of errors; one filed upon appeal from the trial court to the Supreme Court of the Territory (pp. 88, 89), and one filed in the last mentioned court upon the appeal to this court (pp. 120, 121). These assignments seem in each instance to be based upon the erroneous assumption that the whole evidence taken in the trial court is before the appellate court for review. But in addition such assignments, in part, attempt to raise certain questions of law by reference to this entire evidence treated as a statement of facts.

If it appeared from the record that the whole of the evidence taken in the trial court had been legally filed and approved, within the time allowed by the statute, as a statement of facts, and if it further appeared that this

statement had been affirmed and adopted by the Supreme Court of the Territory, upon the appeal from the trial court, as such a statement, the question might possibly arise whether errors of law appearing therein might not be reviewed in this court as suggested by assignments of error. No such question, so far as we are advised, has ever been decided or presented. The nearest approach to it known to counsel was in Haws *v.* Victoria Copper Mining Company (160 U. S. 303, 313), wherein the court held that where the Supreme Court of the Territory affirmed the findings of the trial court and thus adopted them as its own, they served the purposes of a finding of fact upon appeal to this court. In that case, however, the findings of the trial court did not embrace the entire testimony but were specific findings of ultimate facts as required by the act of 1874.

A complete and conclusive answer, however, to the proposition, in the case at bar, is found in the considerations—first, that, as already pointed out, the body of the evidence relied upon as a statement of facts was not made, approved or filed within the time allowed by law; second, that such statement was never affirmed or accepted as such by the Supreme Court of the Territory.

We accordingly, under this general proposition, submit that nothing in the record properly presents to this court for review any question affecting any ruling of the trial court on the admission or rejection of evidence, and that this appearing, and there being no finding in the nature of a special verdict, the decree below should, upon these grounds alone, be affirmed.

IV.

The Rulings of the Trial Court as Attempted to be Shown by the Bill of Exceptions.

The bill of exceptions attempts to raise twelve questions involving alleged error by the trial court in the admission or rejection of evidence. Only five of these are even referred to in the brief of counsel for appellee, filed in this court, and in these five instances the argument of counsel is, in fact, nothing more than a mere statement of the propositions, comprising in all less than sixteen lines on pages 19 and 20.

Under the circumstances nothing further upon our part than a brief notice of these five rulings seems necessary; and that only upon the assumption that the exceptions are rendered intelligible by reference to the judgment roll itself, or that we are mistaken in the proposition that the record contains no statement of facts whatever. These five exceptions are as follows:

First. To the admission of the deposition of A. J. Mehan (Exception I), on the ground of no showing of Mehan's absence. (Transcript, p. 15.) As to this exception, it is only necessary to say that without reference to the statement there is nothing to indicate what showing of absence was made; that upon reference to the statement it appears that there was abundant positive proof of absence (pp. 50 to 53), and that in any event the ruling is one of mixed law and fact not reviewable upon bill of exception.

Second. To the admission of the deposition of the said Mehan, on the ground that his testimony was parol evidence offered to vary a deed, and that he could not be heard to dispute his title against a judgment creditor. (Exception VI, p. 15.)

The bill of complaint alleged title in plaintiff through a judgment recovered against Mehan; execution thereon against this property, advertisement, and sale thereof, and a purchase at such sale by plaintiff, the judgment creditor.

The answer of defendant denied title in plaintiff; alleged that the record title in Mehan was solely under a deed from Daley; that such deed was without consideration and with knowledge of an equitable title in defendant; that the plaintiff purchased with knowledge of such equitable title; that by decree of divorce, defendant was awarded full title to all of said premises; that by final decree in another suit against Daley, Mehan and others, the title of plaintiff had been quieted as against said defendants in said suit and all persons claiming under them by title subsequent to commencement of such suit, and that plaintiff's only title was subsequent thereto. The deposition of Mehan was to the effect that the deed to him was without consideration; that when he received it he promised Daley to take care of the property for the benefit of his (Daley's) wife, the defendant; that witness was to sell the property and satisfy the defendant after paying his own expenses, and that Daley at the time declared to witness that it was defendant's money that made the property. (Transcript, pp. 49–50.)

The question primarily raised by these pleadings, under the general denial of the answer, was the validity and sufficiency of the complainant's title; and as it is entirely clear that the purchaser, whether the judgment creditor or a third party, takes only such title as was possessed by the judgment debtor, it follows that any evidence tending to show the character of the title held by Mehan was competent and relevant. To this point Mehan himself was undoubtedly a competent witness, and if his testimony

when given showed no beneficial interest in himself but only a bare legal title by a deed without consideration, that would have been conclusive against the plaintiff's title, especially if it appeared that the purchase was made with the knowledge of the facts as alleged in the special defence. The deposition when offered covered this exact point, the witness testifying that he paid no consideration and held no beneficial title.

The special defence and cross-claim set up the equitable title of defendant; that the deed to Mehan was without consideration; that appellee's equitable title was known to Mehan at the time of the conveyance; that by decree of divorce upon ground of desertion, defendant had been awarded all of said property; that by a decree in another suit, with notice of *lis pendens*, to which Mehan was a party, the title of defendant had been quieted, and that plaintiff bought at the constable's sale with notice of all these facts. To support this special defence and cross-claim, the testimony of Mehan was also clearly competent. That his deposition went further, perhaps, than was actually expected and established a positive and express trust in favor of the defendant, does not alter the situation. His testimony was competent upon either theory. Whether such testimony was sufficient to overthrow the plaintiff's case and establish that of the defendant is another question not pertinent to the present inquiry and one which, in the absence of the special verdict, this court cannot review. The only question here possible is whether Mehan was competent to testify to the real character of the transaction between Daley and himself, that real character being known to plaintiff at the time of his purchase. We submit that he was so competent.

Third. To the admission in evidence of the "judgment

roll in case No. 1,534 of Angela Dias de Daley *v.* James Daley." (Exception III; transcript, p. 15.) Case No. 1,534 is the divorce proceeding mentioned in defendant's amended answer (p. 8).

The so-called statement of facts does not include any portion of the judgment roll except the final decree (pp. 42, 43), although the entire proceeding was admitted (p. 82). The offer is shown at pages 43 and 44, where, upon objection interposed, the counsel for defendant states that the record is offered only as far as it is binding on all the world and for the purpose of showing that the defendant was the wife of Daley; that she had been divorced, and that her name was then Angela Dias; and it was admitted that the decree was not conclusive evidence on the question of property. For the purposes thus indicated at least the testimony was clearly material and admissible.

Fourth. To the admission of the "judgment roll in case of Angela Dias de Daley *v.* James Daley *et al.*, No. 1,535," on the ground that the same was immaterial, irrelevant, and incompetent. (Exception IV, p. 15.)

The document referred to in this exception is not found in the record even in the statement of facts. It appears to have been offered in evidence, at page 44, and the entire judgment roll understood to be admitted (p. 82), but no portion thereof except the final decree (pp. 44, 45, and 46) appears in the transcript. After the filing of the transcript in the appellate court, the appellant filed in said last-mentioned court an exemplified copy of a *part* of said judgment roll, the complaint (pp. 91, 92), but this is clearly not before this court for any purpose, especially in view of the fact of the admission of counsel for appellant (brief, p. 29) that an amended complaint was filed, which is not in the record.

This exception must, therefore, be explained by refer-

ence solely to the supplemental amended answer of the defendant (pp. 10, 11) and the final decree in the cause (pp. 44–46). The answer in this regard, as separate defence and cross-claim, alleges that prior to plaintiff's purchase at the execution sale the defendant, as plaintiff, commenced an action, No. 1,535, against James Daley, Mehan, and one Dewitt C. Turner (to whom Mehan had conveyed an interest) to quiet title; that upon the commencement of this action, defendant caused notice of *lis pendens*, stating names of the parties, object of the suit, and description of the property, to be filed in the office of the county recorder of the county; that thereafter such further proceedings were had in said cause that the court entered its final decree declaring the appellee herein, plaintiff in said suit, the owner of all the said premises, and quieting her title to the same against the said Daley, Mehan, and Turner, and all persons claiming under them or either of them, by title subsequent to the recording of the notice; and that the plaintiff, Cohn, took title from Mehan after such record, and has no other title to the premises. The decree, the only part of the judgment roll shown by the statement, declares plaintiff the owner of the premises; that the defendants have no title or interest therein; cancels the deeds from Daley to Mehan and from Mehan to Turner, and quiets the title of plaintiff as against all said defendants and all persons claiming under them subsequently to the filing and recording of the notice of *lis pendens*. The exception was to the admission of this judgment roll on the ground that it was immaterial, irrelevant, and incompetent. The substantial and real objection is not that the judgment roll is not material, relevant, and competent to prove the issue as raised by the pleadings, but that the case itself, as thus made, does not sustain the conclusion of the court as expressed in

the decree. In other words, a question of mixed law and facts, decided in a general finding by the court below, is here sought to be reviewed, in the absence of a finding in the nature of a special verdict, by a bill of exception. This, we submit, cannot be permitted.

But if this be otherwise, we then submit that the appellant, as the purchaser at the execution sale, took only such title as the judgment debtor held; that this purchase was subject to any adverse rights, titles, interests, or equities, of which he had notice, actual or constructive, at the date of such purchase; that at such date he had, by the filing of the *lis pendens*, notice of the fact that the appellee claimed title to the property as against the judgment debtor; that he purchased, therefore, subject to the result of that proceeding, and that the judgment roll in the particular case was strictly material, relevant, and competent to prove the fact of the suit, the *lis pendens* and the final judgment.

Fifth. To the refusal of the court, as stated in the bill of exceptions, upon the cross-examination of the appellee, to admit questions interrogating the witness as to whether, at a coroner's inquest, she did not testify that she was not the wife of James Daley. Upon objection made, counsel stated that the object was to impeach the witness. The question was excluded. (Exception X; transcript, p. 16; statement of facts, p. 73.)

These questions were properly excluded, as expressly stated by the court in its ruling, because the witness could not be contradicted upon an immaterial point; that they could not be material except as to the marriage, and that the status of the parties was fixed by the decree of divorce.

V.

The Final Decree Below is, In Law, That of July 10, 1895.

A peculiar feature of the rather anomalous transcript in the case is the number of decrees, in their nature final, passed by the Supreme Court of the Territory. They are four in number, three affirming and one reversing the decree of the District Court.

The first in order of time is that of March 8, 1894, affirming in all things the decree of the District Court in favor of the defendant (p. 102). Thereupon, on motion of complainant for rehearing, (pp. 102, 103), which was granted (p. 104), and the intervention of other motions and suggestions, all of which were submitted (p. 104), the case was reargued, and upon second consideration thereof, the court passed and entered, July 10, 1895, its second decree to precisely the same effect as that of March 8, 1894, again affirming in all things the decree of the District Court (p. 104). This decree of July 10, 1895, was, beyond all question, a final appealable decree of the Supreme Court of the Territory. Thereupon, the appellant perfected an appeal to this court by praying the allowance of such an appeal in open court, July 15, 1895, (p. 105), the filing of affidavits, the same day, showing the value of the premises to be upwards of $20,000 (pp. 105 to 107), the allowance, on said date, by the court, of such an appeal (p. 105) and filing an appeal bond, upon such appeal, executed July 29, 1895, approved by the clerk of the court July 31, 1895, and upon this last-mentioned date filed with the clerk as a part of the record (pp. 110, 111, 114).

Pending these proceedings in perfecting an appeal,

to wit, July 23, 1893, after the prayer for appeal and allowance of the same and before the filing of said bond, there was filed with the clerk of the court a paper which is called upon its face a "petition for rehearing" (pp. 107 to 110). This paper is not signed by the appellant or by any attorney or counsel (p. 110) and no notice thereof, so far as the record shows and therefore to be taken as a fact, was in any way served upon appellee or her attorney or counsel. July 31, 1895, less than ten days after the filing of said paper, and some time later than the filing of said appeal bond, on said date, as appears by the affidavit of the clerk (p. 114), the court, entirely *ex parte* so far as the record shows, passed and entered its third decree purporting to grant the so-called "motion" for rehearing, and to reverse the decree of the District Court and to remand the cause for new trial in the court below (p. 112). These proceedings were had at the July term of the court.

August 5, 1895, appellee, by her attorney, filed a motion to set aside and annul the said decree of July 31, 1895, on the ground that the same was made inadvertently, unadvisedly and without authority of law (p. 112). August 15, 1895, appellee, by her attorney and counsel, also filed a motion for rehearing of the cause upon practically the same grounds as the motion to set aside the decree (pp. 113, 114). Counsel preparing this brief has been unable, even by the "diligent search" of the record suggested by the learned attorney for appellant in one of the various briefs which have found lodgment in the transcript, to determine the date upon which the July term of the court adjourned. It would appear, however, we think, by reference to the notice to counsel of the first of the above motions (pp. 112, 113) that this motion was within the term; and we think the only conclusion

to be drawn from the record is that the second motion, that of August 15, 1895, was also within the lifetime of said term. There would appear, therefore, at the adjournment of said term, to have been pending one motion to vacate the decree of July 31, 1895, and one motion for a rehearing of the cause.

February 7, 1896, at the succeeding, January term, the court passed an order denying the motion to set aside the decree, but granting the motion for rehearing and setting the cause down for hearing (p. 118); February 11, 12 and 13, 1896, the cause was again argued and submitted (pp. 118, 119) and, October 6, 1896, the court passed and entered its fourth decree—(*a*) sustaining the motion to set aside the order and decree of July 31, 1895; (*b*) setting aside and annulling the said decree of July 31, 1895, and the order for rehearing preceding the same; (*c*) denying the motion upon which said rehearing was ordered, and (*d*) reinstating and confirming the decree of July 10, 1895 (p. 119).

In the brief of the learned counsel for appellant filed in this court upon the appeal (pp. 23 to 29), it is contended that the court below had no jurisdiction or power to pass its decree of October 6, 1896, because made after the expiration of the July term of the court, and that the decree of July 31, 1895, therefore stands as the final judgment. And as this may possibly be a question, appearing from the judgment roll itself and perhaps properly before the court, this contention of our adversaries is here noticed.

Answering this contention on the part of appellant, we submit:

First. Even if the decree of July 31, 1895, had not been vacated, it nevertheless would have no validity because made in direct violation of the practice code of the Territory.

The Revised Statutes, under title "rehearing," after providing by section 954 that a motion for rehearing may be filed within fifteen days from date of the judgment and that such motion must specify the name and residence of opposing counsel, if known, and if not, then the name and residence of the party to the cause, thereupon, by sections 955, 956 and 958, (Revised Statutes, 1887, p. 198) exact as follows:

"955. (Sec. 307.) Upon the filing of such motion with the clerk of said court he shall make out a certified copy of such motion and transmit the same by mail to the sheriff or any constable of the county in which the attorney or opposing party, as the case may be, is alleged in said motion to reside, together with a precept commanding him to deliver the copy of the motion to the person named in such precept."

"956. (Sec. 308.) Upon the receipt of such precept and copy of motion by the officer it shall be his duty to deliver the copy of the motion to the person named in said precept, if found in his county, and to return said precept to the court from which it issued, by mail, stating thereon at what time and to whom he delivered the copy of the motion, or that the party named in the precept is not to be found in his county, as the case may be."

"958. (Sec. 310.) At any time after ten days from the return of such precept served, it shall be lawful for said Supreme Court to hear and determine such motion for rehearing and not sooner."

In the case at bar not one of these requirements was complied with. The so-called petition or motion did not specify the name and residence of either counsel or the adverse party; the clerk did not make out any certified copy thereof, or precept, and transmit the same to the sheriff or any constable of the county for service; there was no service of any copy or return of any precept, and, finally, the petition or motion was heard, determined and

the decree thereon entered by the court less than ten days, to wit, eight days, after the filing of said motion.

Upon principle, as well as under the express construction of the practice code by the highest court of the Territory (Sutherland *v.* Putnam, *supra*), these provisions are mandatory, and without compliance therewith no jurisdiction to act exists. It follows that the decree of July 31, 1895, was entered entirely without jurisdiction and void.

Second. Even in the absence of this express statutory rule, the decree of July 31, 1895, would not in any event be sustained by this court. The motion, so called, was not even dignified by the signature of either party or counsel; it was never, in any way, noticed to the appellee, and the entire proceeding was absolutely *ex parte*. It is entirely safe to say that this court would never, even in the absence of statutory provisions governing the subject, treat a decree so entered as any thing more than an act done by pure inadvertence and accident.

Third. The decree of July 31, 1895, was entered after the court had lost jurisdiction by the perfection of an appeal to this court. The transcript proper, as already recited, shows that appeal, in open court, was prayed and allowed, July 15, 1895, and that an appeal bond, the very bond and the only one now in the case, with the sureties approved by the clerk, was filed with said clerk, as part of the case, July 31, 1895. On this same date was entered the decree in question and the affidavit of the clerk of the court, (p. 114), filed with appellee's motion to vacate the decree and which to establish this fact we believe competent, shows that the filing of said bond antedated the rendition of the decree.

The code of civil procedure, governing this question, is also clear (sections 849, 859 and 861; 1887, pp. 186, 187):

"849. (Sec. 201.) An appeal may in cases where an appeal is allowed be taken during the term of the court at which the final judgment is rendered by the appellants giving notice of appeal in open court, which shall be noted on the docket and entered of record, and by filing with the clerk an appeal bond or affidavit in lieu thereof, as hereinafter provided, within twenty days after the expiration of the term."

"859. (Sec. 212.) The appellant or plaintiff in error, as the case may be, shall execute a bond with two or more good and sufficient sureties, to be approved by the clerk, payable to the appellee or defendant in error, in a sum at least double the probable amount of the costs of the suit of both the appellate court and the court below, to be fixed by the clerk, conditioned that such appellant or plaintiff in error shall prosecute his appeal or writ of error with effect, and shall pay all the costs which have accrued in the court below, or which may accrue in the appellate court."

"861. (Sec. 213.) When the bond, or affidavit in lieu thereof, provided in the preceding sections, has been filed and the previous requirements of this act have been complied with, the appeal or writ of error, as the case may be, shall be held to be perfected."

Under these provisions of the code, the court had clearly lost jurisdiction of the case prior to the decree in question. Precisely as pointed out by the statute, the appeal had been "perfected" by filing the bond with sureties "approved by the clerk." The only possible question in this connection relates to the exact hour of filing the bond on the 31st day of July, 1895. The court will hardly assume that it was filed *after* a decree rendering its filing unnecessary and preposterous. And we think that if any doubt exists on the subject, it may properly be resolved by reference to the affidavit of the clerk, the matter not being a fact in the case, but rather an explanation of docket entries of the court.

Fourth. Even if all this be otherwise, still the appellee, at the same term of court, filed a motion for rehearing and also a notice to vacate; these motions were pending at the adjournment of the term, remained undecided until the ensuing term, and, at said last-mentioned term, were granted and the decree of July 31, 1895, vacated and that of July 15, 1896, again affirmed. This, we submit, was clearly within the jurisdiction of the court.

In view of the foregoing considerations, we do not deem it necessary to follow the learned counsel for appellant in their argument of the familiar proposition that the power of a court over its judgments and decrees, generally speaking, ends with the term. The rule is simply inapplicable to the pending case which is governed by the exceptional facts and the provisions of the statutory law mentioned.

VI.

Questions upon the Merits.

In view of the foregoing it seems hardly necessary to advert to what might perhaps have been meritorious questions had the case come to this court upon a finding or statement of fact in the nature of a special verdict. Counsel for appellant assumes everything contained in the stenographer's report to be facts in the case properly here for review, and thereupon argues two certain propositions which are supposed thereon to arise. As hereinbefore stated, it is impossible to say that the decree of the court below proceeded in favor of the appellee upon any other ground than that no appeal had been properly perfected, and that the decree of the trial court should, therefore, be affirmed. There is nothing whatever in the record

to show that the Supreme Court of the Territory in passing its final decree decided any question involved upon its merits. In fact its refusal to file any finding of facts or statement of rulings indicates that its decree proceeded upon the ground that the case had not been properly brought before it; that in accordance with the construction given the practice act four years previously in Sutherland *v.* Putnam, it could in such case either dismiss the appeal or affirm the decree below, and that it, therefore, upon the ground of illegality in the appeal alone, affirmed the decree of the District Court.

Under the circumstances, and having hereinbefore, as we think, demonstrated that this court has now before it no question of either fact or law for review, we content ourselves with a bare statement of our positions as the same would appear from the record to have been presented in the trial court.

(1) The facts shown by the testimony establish a resulting trust in the appellee for the premises in controversy. Whether she was the wife of Daley, or otherwise, the acquisition of the title to these mines, under the laws of the United States, including the locations in which she actually participated, the subsequent working and development of the same and every step in the maintenance of the title, was entirely the result of the expenditure of her money, owned by her prior to her marriage, if married; she understood that the locations were in her name and such were her intention; Daley, in law, was her agent in respect to the transaction, and so acting he located the mines in his own name. Here are all the elements of a resulting trust and that was the effect of the transaction. As illustration merely of the familiar principle, see:

Pomeroy's Equity Jur., §§ 1030, 1031, 1037, 1040.

Am. & Eng. Ency. Law, Vol. 10, pp. 5 to 11, and cases cited.

Du Barry *v.* Wheeler, 30 S.W. Rep. (Mo.) 338.

Evans *v.* Welborn, 74 Texas, 530.

(2) The facts in connection with the deed from Daley to Mehan establish an express trust in favor of the appellee. The uncontradicted and unimpeached testimony of Mehan (pp. 49 and 50) is that he met Daley in Pueblo, Colorado, September 2, 1890; that on that day he deeded the premises to deponent; that deponent paid no consideration for such conveyance; that deponent promised Daley to take care of the property for the appellee, to make sale of the same, and from such sale satisfy the appellee, after paying his own expenses; that Daley told him that appellee's money had made the property; that the mines were good and that he wanted his wife protected.

The deed thus executed was, beyond all question, an express though secret trust, and was effective for the purpose contemplated unless prohibited by some statute.

Osterman *v.* Baldwin, 6 Wall. 117, 123.

That such a trust by parol was prohibited by statute is what is claimed by appellant and text writers, and several cases are cited to sustain the contention. Upon examination, however, all of these authorities will be found to be based upon some statute of frauds, either 29 Car. II, Chap. 3, Sec. 7, or statutes of similar import, declaring trusts in land not in writing void. Arizona has no such statute. Precisely such a provision once existed in this Territory, and will be found in Howell's Code, Ch. 36, Sec. 6. It was retained in the compiled laws of 1877 (par. 2119, Sec. 6, p. 362). The Revised Statutes of 1887,

however, expressly repealed this entire chapter 36 (R. S. 1887, pp. 567, 568) and enacted a new statute of frauds (R. S. 1887, Ch. 30, p. 359), from which this provision is entirely omitted. There is no prohibition, therefore, of such a trust under the statute of Arizona.

Osterman *v.* Baldwin, 8 Wall. 123, *supra.*

Counsel for appellant, realizing apparently the difficulty of this situation, suggests (brief, p. 13) that that portion of the fourth section of the English statute of frauds relating to contracts for the sale of real estate or leases thereof for more than year, which is found in the Arizona statute (Sec. 2030), prohibits the express trust in question. It was not section four but section seven of the original statute of frauds which dealt with trusts, and which, having been adopted, was, in 1887, repealed in Arizona, while section four was retained. It need hardly be suggested that the legislature, by the revised statutes of 1887, deliberately repealed the positive prohibition of section seven merely to re-enact it in the lease for years provision of section four.

Trusts have been repeatedly declared and enforced in public lands located under mining, pre-emption, and homestead laws.

Maritz *v.* Lavelle, 77 Cala. 10.
Barlow *v.* Barlow, 28 Pac. Rep. 607.
Booth *v.* Justice, 58 Tex. 106.

(3) The appellant, as a purchaser at the execution sale, took only such title as the judgment debtor held, and received such title subject to all outstanding equities, certainly to all equities of which he had either actual or constructive notice.

Shirk *v.* Thomas, 121 Ind. 147.
Osterman *v.* Baldwin, 6 Wall. 116, 122.

The filing of the notice of *lis pendens* was notice of the equitable title of the appellee, and appellant was not a *bona fide* purchaser.

Freeman on Judgments, Secs. 193, 198.
Evans *v.* Welborn, 74 Texas, 530.
Pucket *v.* Benjamin, Adms., 21 Oregon, 370.
Hope *v.* Blair, 105 Mo. 85.
Keller *v.* Stanley, 86 Ky. 240.
Powell *v.* Campbell, 20 Nev. 232.
Dwyer *v.* Rippentoe, 72 Texas, 520.
Stevenson *v.* Edwards, 98 Mo. 622.
Hart *v.* Studman, *ib.* 452.
Cassidy *v.* Kluge, 73 Texas, 154.
Spencer *v.* Credle, 102 N. C. 68.
Collingwood *v.* Brown, 106 *ib.* 362.
Wallace *v.* Marquette, 88 Ky. 131.
Drinkhouse *v.* S. V. W. Co., 87 Cala. 253.
Hovey *v.* Elliott, 118 N. Y. 125.

Amendments of pleadings to change notice of *lis pendens* must be such as change either the cause of action, the parties, or the specific property.

Freeman on Judgments, Sec. 199.
Stone *v.* Connelly, 71 A. D. 449.
Wortham *v.* Boyd, 66 Texas, 401.
Brook *v.* Pierson, 25 Pac. Rep. (Cala.) 963.
Randall *v.* Duff, 19 Pac. Rep. 532.

The doctrine that a judgment lien is superior to the legal title previously to the lien conveyed to a third party by an unrecorded deed, and that this superiority is not affected by notice prior to purchase under judgment execution (to which alone the cases on the brief for appellant apply), is based entirely upon the effect of registration

Supreme Court of the United States.

OCTOBER TERM, 1898.

ADOLPH COHN,
APPELLANT,
v.
ANGELA DIAS (DE DALEY),
APPELLEE.

No. 136.

Appeal from the Supreme Court of the Territory of Arizona.

SUPPLEMENTAL BRIEF FOR APPELLEE.

JAMES K. REDINGTON,
Attorney for Appellee.

JAMES REILLY,
Of Counsel.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1899.

IN THE

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Since the submission of this cause, upon April 5th, 1899, counsel for appellant has transmitted to the clerk a brief in reply to that submitted, upon said hearing, for appellee. If such brief be accepted by the court, we respectfully request that the following may also be taken in reply thereto. What we now submit is filed simply to avoid the inference that we in any way assent to some remarkable statements of fact found in this brief for appellant.

I.

Referring to the fatal legal defects in the preparation and filing of the so-called statement of facts and bill of exceptions, as pointed out in our prior brief, counsel for appellant, in this last brief, says:

"These were matters solely for the trial judge and could be raised in the Supreme Court of the Territory only by motion to strike out as not properly a part of the record. Though the court could, if it saw proper, disregard a document which it held to be *not a part of the record*. No such motion was made and that court did not so hold."

We assert that precisely such a motion *was* made. It is found upon pages 93 and 94 of the transcript, and is here inserted in full:

"Now comes the appellee Angela Dias and moves this honorable court for an order striking out from the transcript filed by appellant in this court in the above-entitled cause the following, to wit:

First. Strike out the alleged state- of facts, pages thirty to one-hundred and thirty-four, both inclusive, of said transcript, on the ground that said alleged statement of facts was not approved, settled, nor signed by the trial judge, nor filed with the clerk of the trial court within the time allowed by statute.

Second. Strike out *of* the appellant's bill of exceptions, pages twenty-three to twenty-nine of said transcript, on the ground that the same does not contain a statement 'with such circumstances' or so much of the evidence as is necessary to explain the same.

Third. Strike out *of* the appellant's assignment of errors on the ground that the appellant did not file the same with the clerk of the court below before he took the transcript of the record from the office of said clerk.

Fourth. Strike out a paper filed with the transcript in this cause in this court on December 25th, 1893, entitled 'Supplement to record,' on the ground that the same is not a part of the record by law, nor made a part thereof by statement of facts or bill of exceptions.

JAMES REILLY,
ALLEN R. ENGLISH,
Atty's for Appellee."

Furthermore, counsel for appellant who signs this last brief containing the above quotation, obtained leave to file and actually filed in the Supreme Court of the Territory an answer to or brief opposing said motion. This answer, or brief, appears, as one of the eccentricities of this case, at pages 95 to 97 of the transcript, and is in part as follows:

"Now comes Adolph Cohn, appellant, and to the motion filed by Angela Dias to strike out from the transcript the statement of facts, the bill of exceptions, assignment of errors, and the supplemental paper filed December 25th, 1893, *and* says," etc.

In view of the foregoing, upon what authority does counsel assert that no motion to strike out these papers was filed?

II.

Upon page 3 of the brief, counsel asserts: "Appellants are not responsible for this ragged, vacillating record."

Who is? Whose duty but the appellant's was it to perfect his appeal according to law, and to bring the case to this court in compliance with the statute, and in intelligible form? And having failed to do so, who will suggest that this court is required to reverse the decision below in order that he may have another chance?

III.

Counsel argues that the appeal to this court brings up the entire cause for review, "as if an appeal had been taken from the Circuit Court of the United States from a decree in chancery."

This proposition conveniently eliminates entirely the Act of Congress of April 4, 1874 (18 Stat., 27). That act expressly declares the law for all cases reviewed in this court from the highest courts of territories, and, as already shown in our previous brief, this court has repeatedly given said act construction to the contrary of the proposition here advanced. (See pages 16, 17, 19, 20 of prior brief and cases cited.)

Respectfully submitted.

JAMES K. REDINGTON,
Attorney for Appellee.

JAMES REILLY,
Of Counsel.

COHN *v.* DALEY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 186. Argued and submitted April 4, 5, 1899. — Decided May 15, 1899.

For the reasons stated in the opinion of the court, it is precluded from looking at the so-called statement of facts, and when they are excluded from the record there is nothing left for review, and the judgment below is affirmed.

THE statement of the case will be found in the opinion of the court.

Mr. Marcus A. Smith for appellant submitted on his brief.

Mr. James K. Redington for appellee. *Mr. James Reilly* was on his brief.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This is an action to quiet title to certain mining claims in the Territory of Arizona.

The appellant was plaintiff in the court below, and the appellee was one of the defendants impleaded with A. J. Mehan, Dewitt C. Turner and Bell H. Chandler.

Appellant claims to derive title from one A. J. Mehan under an execution sale upon a judgment obtained by him against Mehan in one of the justices' courts of Cochise County, in said Territory, and a deed executed in pursuance of such proceedings and purchase.

The appellee denied the ownership of appellant, and asserted a superior right upon the following allegations: That on the 11th of April, 1890, and for more than five years before, she and one James Daley were husband and wife, and lived together as such. At the time of the marriage he owned no money nor property of any kind, but that she had three thousand dollars "in United States coin and currency;" and prior to the 11th of April, 1890, she and Daley used all of said money "in prospecting for, locating and procuring, preserving and maintaining titles to mines and mining claims," and owned the claims in controversy on the said 11th of April. During the coverture she was uneducated and utterly ignorant of the language, laws and customs of the United States and the Territory, and Daley was fairly well versed therein; and, confiding and relying on "the advice of her said husband," advanced him her money "to procure, preserve and maintain the title" to the mining claims, and he took advantage of her ignorance and the confidence reposed in him, "and took and kept the title to all of said mining claims, and interests in mining claims in his own name," without her knowledge or consent, and on the 11th of April, 1890, he abandoned her, and has not since returned to or communicated with her.

On the 2d of September, 1890, Daley conveyed the claims by deed duly acknowledged and recorded in the recorder's office of Cochise County, of said Territory, to A. J. Mehan, who gave no value therefor, and who had full notice and knowledge of all her equities.

The appellant claims to own the claims by virtue of an attachment, judgment, execution sale thereunder, and a con-

stable's deed in the case of *Adolph Cohn* v. *A. J. Mehan*. Cohn was plaintiff in the action and the purchaser at the sale, and at that time and long prior thereto had full notice and knowledge of her equities, and notice and knowledge that Mehan had given no value for his conveyance. On the 15th of September, 1890, Mehan conveyed an undivided half interest in the claims, by a deed duly acknowledged and recorded, to Dewitt C. Turner, and on the 22d of November, 1890, a like deed of one third interest to the defendant Bell H. Chandler, neither of whom gave value for his conveyance, and both of whom had notice of her equities, and of Mehan's knowledge thereof, and that Mehan had given no value for his conveyance. On the 8th day of January, 1891, the defendant Turner conveyed an undivided one sixth to the defendant F. C. Fisher, who had knowledge of her equities, and the notice and knowledge of the prior parties. On the 15th of October, 1890, she commenced an action for divorce from said Daley, and on the 14th day of May, 1891, a decree was rendered therein in her favor dissolving the marriage and awarding her the mining claims in controversy, and permitting her to resume her maiden name of "Angela Dias."

On the 18th of October, 1890, and before Cohn bought the claims, she commenced an action against Daley, Mehan and Turner to quiet the title to the claims, and caused to be filed in the recorder's office of the county where the property was situated a notice of the pendency of the action, containing a statement of the nature of the action and of her ownership of and a description of the claims; and Adolph Cohn took title from Mehan after the filing and recording of such notice.

She prayed to be decreed owner of the claims, and that defendants be adjudged to have no interest in them, and that their deeds be cancelled.

The other defendants made default, and the trial proceeded on the issues made between appellant and appellee, and judgment was rendered for her and duly entered. A motion for a new trial was made, but was overruled on the 26th day of November, 1892.

A bill of exceptions was submitted by the appellant on the

1st of December, 1892, and settled and allowed on the 15th of said month by the judge who presided at the trial, after objections made by appellee were heard and considered.

The bill of exceptions recites "that on the 27th of May, 1892, the above cause came on regular for trial, and during the progress thereof the following proceedings were had, as more fully appears in the statement of facts filed herein expressly referred to, and the exceptions to rulings of court as therein shown are made a part of this bill of exceptions."

Then follows an enumeration of the rulings and the motion for new trial and the ruling thereon.

A statement of facts or what is called such was submitted to the counsel of appellee on the 16th of December, 1892. It was entitled in the court and cause, and contained the following recital:

"Transcript of shorthand notes of testimony, etc., taken from the trial of the above-entitled cause, at the court room of said court, in the city of Tombstone, on Friday, the twenty-seventh day of May, A.D. 1892, at 9.30 o'clock A.M., before the court (Hon. Richard E. Sloan, presiding) sitting without a jury, in the presence of W. C. Staehle, Esq., attorney for, and W. H. Barnes, Esq., of counsel with, plaintiff, and James Reilly, Esq., attorney for defendant Angela Dias de Daley; Allen R. English, Esq., for counsel."

Following this recital is a verbatim transcript of the proceedings and of the evidence by question and answer, and of the rulings of the court. It concluded by the following recital:

"The foregoing 102 pages and documents herein referred to and to be copied into the transcript of the clerk when directed is submitted to the opposite party, the defendant, by plaintiff as a full statement of facts in the trial of this cause, and is by the plaintiff agreed to as such.

"Dec. 16, 1892. W. H. Barnes,
Att'y for Plaintiff."

The record contains the following:

"We agree that the foregoing — pages of typewriting en-

titled in the above cause contain a transcript of the reporter's notes taken at the trial of said cause, which was filed therein with the clerk of the court November 25, 1892, but said pages also contain matter not in such transcript when so filed, to wit:

"'Clerk will here copy said notice in transcript,' and many such commands, commencing on page 3 of transcript, all commanding or directing the clerk to insert in his transcript all the documentary evidence introduced by plaintiff (appellant) at the trial, but none, except in one instance, of the documentary evidence of defendant (appellee), though defendant introduced in evidence many documents, including the deposition of A. J. Mehan, as shown by said transcript, pages 37 to 40, inc., and the alleged 'statement of facts' is not such nor even a fair statement of the evidence, and we do not agree thereto.

JAMES REILLY,
Attorney for Angela Dias.
ALLEN R. ENGLISH,
Of Counsel."

"Counsel for plaintiff in the above-entitled cause of *Cohn* v. *Mehan et al.* having heretofore, to wit, on the 16th day of December, 1892, submitted to me a statement of facts in said cause, and the same having been thereupon submitted to counsel for defendants and being by them disagreed to as correct and being likewise found by me to be incomplete because omitting documentary evidence, said counsel for plaintiff did thereafter, to wit, on the 6th day of March, 1893, submit the foregoing as an amended statement of facts in said cause, and the same was on said sixth day of March, 1893, by me approved and signed.

RICHARD E. SLOAN, *Judge.*"

A completed statement was not filed till May, 1893. The judgment was affirmed on appeal to the Supreme Court of the Territory, and the case was then brought here.

If the so-called statement of facts was filed in time under the Arizona Revised Statutes, it was not a "statement of the facts in the nature of a special verdict made and certified by

the court below" under the act of April 7, 1874, c. 80, 18 Stat. 27, 28. We must assume therefore that the evidence supports the judgment. *Marshall* v. *Burtis*, 172 U. S. 630.

Was the statement filed in time to become a part of the bill of exceptions? Certainly not, if it was not on file at the time of the settlement of the bill of exceptions or did not afterward become a part of the record. It was submitted on the 16th of December, but not agreed to. It was not approved and signed by the judge who tried the case until March, 1893, and not filed until May, 1893.

The Revised Statutes of Arizona provide as follows:

"843. (Sec. 195.) After the trial of any cause either party may make out a written statement of the facts given in evidence on the trial and submit the same to the opposite party or his attorney for inspection. If the parties or their attorneys agree upon such statement of facts, they shall sign the same, and it shall then be submitted to the judge, who shall, if he find it correct, approve and sign it, and the same shall be filed with the clerk during the term.

"844. (Sec. 196.) If the parties do not agree upon such statement of facts, or if the judge do not approve or sign it, the parties may submit their respective statements to the judge, who shall from his own knowledge, with the aid of such statements, during the term, make out and sign and file with the clerk a correct statement of the facts proven on the trial, and such statement shall constitute a part of the record.

"845. (Sec. 197.) The court may by an order entered upon the record during the term authorize the statement of facts to be made up and signed and filed in vacation, at any time not exceeding thirty days after the adjournment of the term."

The record shows that the November term of the court at which the case was tried was finally adjourned December 29, 1892. The statement was therefore not filed within the time required by the statute, and cannot be considered as part of the record.

The rulings of the court, as exhibited in the bill of exceptions, are assigned as error. But for an understanding of the rulings the testimony in the case is necessary, and we are

precluded from looking at it, because it is not properly a part of the bill of exceptions, for the reasons we have given.

It follows that on the record there is nothing for our review, and judgment is

Affirmed.